THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOISE PEPION COBELL et al.	)	
	)	
Plaintiffs	)	
	)	
v.	)	**Civil Action No.**
	)	**96-1285 (RCL)**
GALE A. NORTON	)	
SECRETARY OF THE INTERIOR, et al.	)	
	)	
Defendants	)	
	)	
_____	)	

SIXTH REPORT OF THE COURT MONITOR

I. INTRODUCTION

This is the sixth report in a series of reports submitted by the Court Monitor pursuant to this Court=s Order of April 16, 2001, to review and monitor Aall of the Interior defendants= trust reform activities and file written reports of (the Court Monitor=s) findings with the Court.@

This report will address the Court Monitor=s review of the AStatus Report to the Court Number Eight@ (AEighth Quarterly Report@), submitted on January 17, 2002 under signature of the Secretary of the Interior, Gale A. Norton.

On November 26, 2001, the Interior Defendants (ADefendants@) filed an AEmergency Motion To Stay Filing Of Eighth Quarterly Trust Reform Status Report Pending Ruling On Motion To Permit Modified Form Of Report@ (**Tab 1**).

In the memorandum in support of that Motion accompanying it, the Defendants stated in part:

> **AAs set forth in the Report Motion, certain critical events in Interior=s trust reform efforts have taken place during and immediately following the period to be covered by the eighth quarterly report. These events include Interior=s receipt of the finding on trust reform and its implementation of the trust reform recommendations of its independent consultant, EDS, undertaking a reorganization initiative placing Indian trust asset management under a single, newly formed directorate, and issuance of OHTA=s 60- and 120-day reports. The reporting of these events constitutes a more informative status report for the eighth quarter than the form heretofore employed.@** *Id.* at 2.

On the same day, the Defendants also filed a AMotion To Permit Filing Modified Form Of Trust Reform Status Report For The Period Ending October 31, 2001@ **(Tab 2).** In the attached Memorandum in support of that Motion the Defendants stated in part:

AThese (EDS) **reports together provide a knowledgeable and detailed view of the status of Interior=s trust reform progress. Interior=s senior managers have relied upon EDS= views in formulating their new management strategyY.**

This memorandum explains how the documents and Declarations comport with the Court=s quarterly reporting requirements and how perpetuation of the previous quarterly reporting format will not adequately inform the Court, the plaintiffs or the public of either the significant findings of senior departmental managers and EDS or the actions of the Secretary based on those findings. A report based on the previous approach also runs the danger of presenting a confusing view of Interior=s plans and intentions. Interior respectfully suggests that (i) the management insights provided by EDS make its reports a superior vehicle for communicating the status of trust reform, (ii) the reorganizational documents provide the best review of current departmental plans, and (iii) the OHTA reports document the status of historical accounting@ *Id.* at 2-3.[1]

Following a November 30, 2001 hearing before this Court in which the Court addressed issues regarding the EDS report and its impact regarding the accuracy of the Seventh Quarterly Report=s statements concerning the status and progress of trust reform, the Defendant=s filed AInterior Defendants= Response To The Court=s Inquiry In the Order To Show Cause Dated November 28, 2001 (**Tab 3**). Defendants stated in part:

AThe EDS Report does not render inaccurate Quarterly Status Report to the Court Number Seven (ASeventh Quarterly Report@), but it does identify shortcomings, some quite substantial, in the overall strategy for accomplishing trust reform that Interior had pursued before its receipt of the EDS Report. During the seventh quarterly reporting period, ending July 31, 2001, the Revised High Level Implementation Plan (ARevised HLIP@) continued to define that overall strategy. Thus, the efforts described in the Seventh Quarterly Report related to the milestones that the Revised HLIP had defined as necessary to accomplish trust reform. With the publication of the EDS Report and Secretary of the Interior Gale A. Norton=s (ASecretary=s@) acceptance of its recommendations, the overall strategy dramatically changed. The Seventh Quarterly Report=s description of particular steps taken to accomplish the Revised HLIP was not rendered inaccurate by this change; *but much of its was instead, rendered obsolete.* *Id.* at 1-2, emphasis added.[2]

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[1] Of note, at fn. 3, page 16, the Defendants also argued that the Court Monitor=s reports and their responses (objections?) to them had also provided the Court and plaintiffs with information on trust reform in addition to their proposed submission.

[2] One is prone to ask if the author of this passage is old enough to remember President Richard Nixon=s Press Secretary=s statement that his previous characterization of the Watergate break-in as a Athird-rate burglary@ was Ainoperable?@

Later, defendants stated:

> **"Interior's quarterly reports described the progress of Interior regarding the individual Revised HLIP milestones. *They did not undertake a comprehensive analysis of the current status of trust reform each quarter, nor did they rely on any comprehensive, objective analyses of that status provided by independent consultants*". Subsequent events, most notably the findings in the EDS Report, suggested that the Revised HLIP did not provide an adequate foundation for achieving trust reform. These findings identify substantial shortcomings in the overall strategy of the Revised HLIP and, therefore, the continued usefulness of reporting on the milestones.** *Id.* at 3, emphasis added.

Finally, they stated:

> **"The EDS Report provided Interior with information it did not have before the filing of the Seventh Quarterly Report – an objective assessment of the current status of the TAAMS and BIA Data Cleanup subprojects from an outside source *with no involvement in the decisions leading to adoption of the original strategy.*"** *Id.* at 6, footnote omitted, emphasis added.

On December 17, 2001, this Court issued an Order (**Tab 4**) denying the Defendants' motion to permit filing a modified form of a trust reform status report and granting them an additional thirty days to comply with the Court's December 21, 1999 Order. It provided:

> **"Beginning March 1, 2000, defendants shall file with the court and serve upon plaintiffs quarterly status reports setting forth and explaining the steps that defendants have taken to rectify the breaches of trust declared today and to bring themselves into compliance with their statutory duties embodied in the Indian Trust Management Reform Act of 1994 and other applicable statutes and regulations governing the IIM trust".**
>
> **It is further ORDERED that the Secretary of Interior shall personally sign all forthcoming quarterly reports."** *Id.* at 1-2.

II. STATUS REPORT TO THE COURT NUMBER EIGHT

On January 17, 2002, Defendants, under signature of the Secretary of the Interior ("Secretary"), filed the Eighth Quarterly Report in compliance with this Court's Order (**Tab 5**).

A. Scope of Review

The Eighth Quarterly Report is a massive document, 171 pages in length. It includes an Introduction, Observations by the Secretary, the Special Trustee, and the Director of the Office of Indian Trust Transition (OITT). It addresses the past quarterly reports' subprojects and adds new sections including Departmental Reorganization, Historical Trust Accounting, Current Accounting Activities, Fractionated Heirship, Cadastral Surveys, Information Technology System Security, and BIA Office of Information Resource Management.

The Eight Quarterly Report significantly changed the format of the individual reports including EDS and Special Trustee Observations on each subproject reviewed by them. Also, the Subproject Managers were given the opportunity to comment on both the EDS and Special Trustee Observations. For TAAMS, BIA Data Cleanup, and Probate, the Deputy Special Trustee, who had been assigned oversight of these subprojects, provided her observations on the subprojects= status.[3]

Based on the scope of past Reports of the Court Monitor (AReports@) that have addressed historical accounting, TAAMS, and BIA Data Cleanup as well as the truthfulness, accuracy and completeness of the quarterly reports, this review of the Eighth Quarterly Report will track the past reviews and address TAAMS and BIA Data Cleanup as well as other pertinent sections of the Eighth Quarterly Report that may cast light on the status of trust reform and the Defendants compliance with this Court=s December 21, 1999 Order and the Indian Trust Management Reform Act of 1994 (A1994 Reform Act@).

The Office of Historical Accounting=s (OHTA) Historical Accounting project, including a review of its section in this Eight Quarterly Report, is the subject of the Fifth Report of the Court Monitor previously filed with this Court. .

B. The Introduction

Setting the tone for later observations by the senior management of the Department of the Interior, the Introduction begins its commentary by stating:

ASTATUS REPORT FORMAT B A PROCESS IN TRANSITION. THE DEPARTMENT=S EFFORT TO SATISFY ITS TRUST RESPONSIBILITIES TO INDIVIDUAL INDIANS IS NECESSARILY AN EVOLVING PROCESS, AND AS THAT PROCESS MATURES, THE MEANS TO BEST INFORM THE COURT WITH RESPECT TO THIS PROCESS WILL ALSO CHANGE. THUS, THE FORMAT OF THIS REPORT VARIES FROM THAT EMPLOYED IN THE SEVEN EARLIER REPORTS SUBMITTED TO THE COURT. THESE CHANGES ARE GUIDED BY REFERENCE TO THE COURT=S ORDERS, ACTIVITIES OF THE COURT MONITOR AND SPECIAL MASTER, THE OBSTACLES ENCOUNTERED THUS FAR BY THE DEPARTMENT, AND THE SECRETARY=S INITIATIVES TO ADVANCE TRUST REFORM AND THE ACCOUNTING EFFORTS BEYOND THE POINT THEY WERE FIRST ENVISIONED BY THE ORIGINAL HIGH-LEVEL IMPLEMENTATION PLAN (>HLIP=) DATED JULY 1, 1998. PRIOR REPORTS WERE STRUCTURED TO REPORT ON THE STATUS OF THE REVISED AND UPDATED HLIP DATED FEBRUARY 29, 2000, AND THE SO-CALLED >FOUR BREACHESY.=

[3] The changed format was not unexpected due to the Defendants= previously stated position that the prior quarterly reports= format and substance was Aobsolete.@

The Department has concluded, however, that the HLIP milestones have become increasingly disconnected from the overall objectives of trust reform. Some milestones have been achieved; some have not been achieved; some have been reported as complete, *but little seems to have been accomplished;* some have been changed; some need reevaluation; others should have been changed but were not; and in hindsight, *trust beneficiaries would have benefited from inclusion of some elements of trust asset management that were not included in prior reports but are now contained in this report.* Moreover, the Secretary=s initiatives to reevaluate trust reform and to create a new organizational structure are more naturally described under new headings, rather than by reference to HLIP subprojects and milestones that have served their purpose, become ineffective, need consolidation given their interdependencies, or *simply do not reflect the true status of trust reform.* *Id.* at 4-5, emphasis added.[4]

The Introduction goes on to state:

A***The format of the HLIP did not encourage reporting on lack of success or the need for additional resources or efforts.***

In contrast, this report covers matters in addition to the status of subprojects. Subproject managers have been asked to discuss obstacles, resource needs, and whether they know at this time the full extent of the endeavor required. These matters are important for an accurate picture of the status of trust reform. Moreover, summary observations from EDS are included under the subprojects, and the managers of the subprojects are given the opportunity to comment upon the EDS observations so that all views are provided.

Milestone charts are omitted since milestones do not fully disclose the status of trust reform. *Id.* at 5, emphasis added.

C. Secretary Gale Norton=s Observations

The Secretary further reviewed both the past and the Eighth Quarterly Report=s format and content by stating:

A**This report details five months of the Department of the Interior=s transition toward a better, more effective program of trust reform. It also details the Department=s efforts to provide information to this Court that reflects, as accurately as possible, not only progress being made but also the problems and obstacles encountered. As indicated in the introduction, the style, methodology and content of this report differ from previous reports. We are introducing a new format that is designed to be more readable, and the information is based upon a methodology designed to document more objectively both accomplishments and lack of progress. The previous format focused on the steps we have taken and the completion of milestones. *In retrospect, this format exacerbated the ordinary human inclination to report accomplishments and to ignore obstacles, difficulties and problems that were not directly related to the milestones. With this report, we have demanded***

[4] While this paragraph=s candor is refreshing, in addition to the beneficiaries benefiting from the inclusion of some elements of trust asset management not included in past quarterly reports, it was the *obligation* of the Defendants to report to the Court and the plaintiffs on these trust reform initiatives in light of the 1994 Reform Act directives and this Court=s December 21, 1999 Order.

that managers report both progress and problems. **Our report also includes the key recommendations of outside management consultants who have criticized the current approach to some trust reform goals.** ***The overarching goal is to provide the Court a more comprehensive and candid reflection of trust reformY.***

We believe we now have a better understanding of the objectives the Department must accomplish. ***This background does not excuse the Department=s past failure to meet its responsibilities in trust management and trust management reform,*** **but it does place in context our growing appreciation of the problems involved and the intensive effort necessary to address them.**

As described in prior submissions to the Court, the Department now views the High Level Implementation Plan (HLIP), by which trust management reform progress was measured and reported to the Court, ***to be obsoleteY. The HLIP is outdated. Many of its identified activities have been designated as being completed; however, little material progress is evident.*** *Id.* at 6-7.

While a subject for analysis later in this Report in conjunction with a review of the Eighth Quarterly Report=s individual sections, the Secretary=s comments on the accuracy and completeness of the past quarterly reports substantially confirm the conclusions of the Court Monitor in past Reports that the seven quarterly reports submitted to this Court by the past and present administrations have been neither accurate nor complete.[5]

D. Special Trustee Observations

The Observations of the Special Trustee, as the primary Department of the Interior (DOI) official designated by Congress to be responsible to Congress and the Secretary for trust reform oversight, bear particular review. He begins with General Observations including the following:

AIt is critical for this Administration and the Department to take three important steps:

First, an overall strategy for trust reform needs to be determined.

Second, an effective organization to execute that strategy must be put in place and staffed. It will be critical that experienced executives, ***preferably with trust experience from the private sector,*** **lead that organization and** ***that there be accountability (and consequences)*** **down the line within that organization.**

Third, uniform business processes need to be provided for certain systems development and data cleanup efforts, and a business plan is needed for the overall organization for trust reform.

Another area of need for trust responsibility is prudent land management to provide beneficiaries, both tribal and individual, with the best income return on their land, normally the principal trust asset. While there are various

[5] The issues regarding the Court Monitor=s conclusions in past Reports that the quarterly reports including the Seventh Quarterly Report have been untruthful will be addressed by the contempt trial now ongoing before this Court against the Secretary and Assistant Secretary **B** Indian Affairs and, later, regarding the other alleged contemnors and will not be addressed further by the Court Monitor.

allegations of mismanagement of the land, there is no overarching plan to effect adequate controls and assure responsible usage. This matter will have to be addressed by the planning process mentioned above.

Many current subproject reports do not provide suitable timelines for the completion of significant elements of the subproject. It is true that, with the input of EDS, many of these subprojects may require reorganization and even combination with other subprojects, and *this reorganization of the subprojects is a major next step for DOI. In many cases the length of time to accomplish subprojects, however, can be estimated and should be.* Otherwise the Special Trustee, the Secretary, and the Court have no useful time dimensions.

***Finally, documentation of the completed steps in the life of a subproject is required. Not all accomplishments to date have been documented sufficiently*, and the Department will need to pursue this discipline.** *Id.* at 11-12, emphasis added.

With respect to the Special Trustee=s Observations on Certain Subprojects or Trust Responsibilities, two observations need mention now prior to reviewing the Eighth Quarterly Report=s subsections.

AAccounting

In this Report, the Department responds to the fundamental tenet of trust: Is there an accurate accounting provided to the beneficiaries, individual and tribal? *When one inspects the accounting responsibilities for trust assets under the law applicable to Indians trust, the answer is basically Ano@.* Until the requisite business plan, systems, policies and procedures, and, most importantly, effective management and employee *accountability* are firmly in place, the accounting responsibilities to the beneficiaries at best will be only partially fulfilled. *Id.* at 12, emphasis added in second sentence; remaining emphasis in original.

Next:

AConclusions

In this report, there are positives in the vetting process by the Department of the individual subprojects for the report plus the receipt of the EDS observations and recommendations on the status of all of the subprojects and trust reform. *Overall progress on trust reform cannot be assured or confirmed, however, because of the apparent inadequate planning and execution to date of the apparent inadequate planning and execution to date of some subprojects and other important remedies for Indian trust.*

Intelligent and objective planning in the upcoming months should provide for the appropriate steps to be taken. It is important to success that the DOI senior management recognizes the interdependencies of the total trust reform effort. Reporting for the subprojects herewith may not include reporting on steps that should have been planned, the absence of which may present problems to the completion of the subproject. *It is in that sense, at least, that parts of this report remain inadequate, in the Special Trustee=s judgment.* *Id.* at 14

In light of these comments, the Court Monitor interviewed the Special Trustee to further expand on his reasoning and gain some idea of the specific subprojects that he was addressing. He stated in substance the following:

The specific projects that he referred to in his Observations were TAAMS, BIA Data Cleanup and Probate as well as the overall trust reform project interdependencies. It is his belief that these form the core of trust reform activities that may impact most severely on IIM trust beneficiaries due to poor planning and execution. They have not been well planned, executed, or reported as he has repeatedly pointed out in the quarterly reports= Special Trustee Observations beginning with the Third Quarterly Report.

Given the poor planning and subproject management, the best of intentioned senior managers reviewing these individual sections and the overall status of trust reform for the Eighth Quarterly Report could not hope to have uncovered all planning and execution failures and, thus, the reporting on at least these projects is most likely incomplete and inaccurate **B** thus inadequate **B** though not intentionally so. Much more investigation and verification must be done in order to be able to completely and effectively address and report on these projects in the future.

1 Director Office of Indian Trust Transition Observations

Mr. Ross Swimmer was appointed by the Secretary as Director of this office and is responsible for planning and implementing the transition of the trust functions into the new trust organization **B** the Bureau of Trust Asset Management or ABITAM.@ The Secretary also assigned him to compile the Eighth Quarterly Report. He required all subproject managers to submit written reports on the status and progress of their subprojects and met with all of them over a two week period where they were required to defend their reports and confirm or supplement information supplied in them. Their reports and defense of them were also subject to review by not only Swimmer but also the Special Trustee and, for at least the TAAMS, BIA Data Cleanup and Probate subprojects, the Deputy Special Trustee, Donna Erwin. Department of Justice (DOJ) and Office of Solicitor (SOL) attorneys were also present for periods during this review.

Some of the Director=s Observations regarding the reviews he and Ms. Erwin carried out were the following:

> **AAs a result of these reviews, beginning in January, OITT will begin to reassess, revise and reprioritize project objectives to generate a more comprehensive, interdependent plan to produce the greatest positive impact for Trust account beneficiaries and holders.** ***In addition, further development and deployment of the ArtesiaLand System known as TAAMS has been deferred until we are satisfied that it is the most appropriate way to automate the land title, realty management and other required trust functions.*** **Work related to TAAMS has been reviewed with subproject managers to explain to them the reasons for deferring further implementation of TAAMS. Also,** ***cleanup projects are being redirected to insure*** that ***there is more emphasis on meeting DOI=s fiduciary duties.*** *Id.* at 15, emphasis added.

Explaining some of the interview process he carried out, he stated:

ADuring the interview process, questions were asked such as: You state you did this task or training or report, etc., where is the documentation? Often the response was similar to: ***I really believe it was done, but I will have to do more checking to confirm.*** **In other words, subproject managers were willing to state certain progress was made but when challenged could not always defend their position. In other instances, I would hear that subproject managers had completed a task, but when asked what happened with their work to insure that the beneficiary received his/her income, the answer often was:** ***That is not my area.*** **As an example, title work might have been completed for a tract so that ownership is legally defensible, but realty might not get the information regarding leases or oil and gas receipts in order to meet distribution payment requirements. It is very alarming to read and hear reports of progress being made and, in some instances, projects completed without having this work fit into an overall context of trust management.** ***It is apparent that some projects could be completed or >under control= yet not add substantively to the requirements of a person receiving income from assets held in trust for them. Although some confusion arises from different writing styles in their reports, the reporting often lacks complete thoughts and understanding of the problems affected or created by the work being reported.***

YThere are many instances where work is being done by one agency or bureau and is simply >thrown over the fence= to the next work group without the normal follow-up that would insure a beneficiary receives his/her income or other responsive information due from a trustee. **It is essential that trust management reform and the on-going business of trust operations be managed by an organizational structure that has accountability from top to bottom.** *Id*. at 15-16, emphasis in original.

F. TAAMS

The TAAMS= section provides some of the reasons for the observations of the Secretary, Special Trustee and Director, OITT, and the actions taken by the Director regarding TAAMS= future development.

Consistent with the Electronic Data Systems (EDS) November 12, 2001 Interim Report and Roadmap for TAAMS and BIA Data Cleanup, the Department of the Interior (DOI) is deferring realty and accounting functionality until the business processes are documented and defined. This delay will enable full definition of requirements for the automated system and is in conformance with recommendations by both the General Accounting Office (GAO) and Congress.@ *Id.* at 121.

The Deputy Secretary of the Interior, J. Steven Griles, who also was active in the direction and review involved with the preparation of the Eighth Quarterly Report, appointed Donna Erwin, the Deputy Special Trustee, to supervise the TAAMS, BIA Data Cleanup, and Probate subprojects on November 14, 2001. Erwin has extensive experience as a trust officer and was previously in charge of successfully managing the development and implementation of the Trust Finance and Accounting System (TFAS). She apparently made a quick assessment of the status of the TAAMS system development, both title and realty, as well as the necessary interfaces, and directed the subproject manager to, in part:

1AEvaluate the ATS product for title for additional requirements.
2Defer further development and implementation of the ATS product until business processes are completed.
3Complete the modification including appropriate testing to correct minor flaws in the current title production system.
4Perform a comparison of current title ownership to Realty and Oil & Gas ownership in the legacy system to determine number and type of anomalies.
5Provide additional reporting capability to the current Title production system.
6Evaluate and modify as necessary all contracts supporting the ATS product to ensure contracts coincide with the recommendations to defer further development and implementation.@ *Id*. at 121-122, emphasis added.

There were no listed AAccomplishments@ other than two regarding the above direction. There were over 30 Asignificant remaining steps@ including:

1AEvaluate further deployment of the ATS product for current Title as* recommended *by EDS.[6]
2Evaluate the deployment of the ATS software to agencies and tribes within Rocky Mountain, Southern Plains, Alaska and Eastern Oklahoma Regions for read only access.
3Complete, review, validate, and re-engineer business processes.
4Perform a comparison of title ownership residing in the ATS system to realty and Oil & Gas ownership in the legacy system to determine number and type of anomalies.
5DOI has purchased 735 licenses and paying 10% help desk and 10% maintenance fee based on cost of licenses B only utilizing approximately 265.
6Need to identify the universe of data cleanup problems for both legacy systems and manual records. *Id.* at 122-123, emphasis added.

In addition to the remaining significant steps there were an additional eight ATasks to Correct Problems, Issues and Concerns including:

1A*Renegotiate ATS contract that currently expires 1/28/02.*[7]
2Approval and implementation of staffing requirements.
3Establishment of accountability factors for all staff involved in trust reform vs. generic performance elements.
4Training on business culture changes to reduce resistance and prepare managers and staff for types of problems that will potentially be encountered.@ *Id.* at 123, emphasis added.

Finally, over five months after the Court Monitor first challenged the representation in the quarterly reports that TAAMS current title was a Asystem of record@ in four Regional title offices, the Eighth Quarterly Report confirms the Second Report of the Court Monitor and

[6] Erwin did not accept the EDS recommendation that TAAMS current title be deployed as quickly as possible. Her reasons were that there was no assurance that, if the TAAMS realty module is abandoned for another commercial product, TAAMS title will be able to, in laymen=s terms, talk to it, thus repeating the past problem with LRIS= and IRMS= inability to communicate effectively.

[7] If the contract is not renewed because the ATS system is found unsalvageable, the Defendants will have to buy the lease for the software, if they want it for the data contained in it, as the contractor owns the software. What price will be exacted from Defendants for this software and will that affect their decision regarding scrapping it or trying to salvage it once again?

subsequent Reports= statements that the TAAMS current title module had not been properly designated as a system of record and still cannot be so called:

> **ÁStatus of Land Title Records Offices**
>
> **The ATS product is being used with limitations, for current title activities in Rocky Mountain, Southern Plains, Alaska and Eastern Oklahoma Regions. LRIS, courthouses, and/or manual processes are still used for title history and some current activities. Actual usage of the ATS product for current title varies widely among these four regions.**
>
> **1Rocky Mountain and Southern Plains regions use the ATS product for virtually all-current title activities.**
> **2Alaska region did not formerly utilize an automated title system. As a result title documents are being compiled by a contractor, encoded into the ATS product by a contractor, and then certified by BIA personnel. If a Title Status Report (TSR) is requested for a tract that is not already in the ATS product, then the title data is given priority for compiling, encoding and certification into the ATS product so the TSR can be generated and certified.**
> **3Eastern Oklahoma has been researching and entering into the ATS product income-producing tracts in the Chickasaw and Seminole land areas. The Self-Governance Tribes of Cherokee, Muscogee (Creek), and Choctaw Nations that have compacts for title have not been able to use the ATS product. The TAAMS Project Office is pending completion of personnel security packages.@** *Id*. at 123-124.

While it is not the purpose of this Report to address the truthfulness of the managers responsible for making this claim in the Fifth Quarterly Report, it was clearly false and known to be so under any definition applied to Ásystems of record@ known to the Court Monitor[8] It was not corrected in any subsequent quarterly report nor in either the initial or subsequent TAAMS= subproject submissions in the Seventh Quarterly Report that were provided this Court following receipt by this Court of the Second Report of the Court Monitor on August 9, 2001.[9]

The Special Trustee=s Observations also highlighted the decision of the Defendants to delay further deployment of the TAAMS current title module and that serious consideration should be given to centralizing all title information in one organization in one location in conjunction with a single data system. *Id.* at 125.

The Deputy Special Trustee=s AAssessment of sub-project@ highlighted the work of the dedicated and concerned DOI employees who had worked on TAAMS but addressed the often-stated reasons for its potential demise including:

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[8] See Quarterly Report to the Court Number Five at page 27: **ÁEffective December 29, 2000, TAAMS was made the system of record for current title for the Rocky Mountain, Southern Plains, Eastern Oklahoma and Alaska Regions.@** This statement was based on a memorandum from the Deputy Commissioner addressed in the Second Report of the Court Monitor at pages 92-93. The memorandum was attached at Tab 10G.

[9] Again, the truthfulness of the seven quarterly reports is a subject under review in the contempt trial. That some statements that are inaccurate were not intentionally reported inaccurately in the quarterly reports is possible. This particular assertion requires the closest of scrutiny.

1ATAAMS efforts have been handicapped by a perceived need for a ›quick fix= that prevented sufficient detailed information gathering and planning
2TAAMS interdependencies with other trust reform efforts not well established
3Insufficient continuity of project managers
4Software contract has unresolved issues due to customization of system
5Inadequate performance metrics have not been defined for contractor tasks
6Inadequate project management@ *Id.* at 126-127, emphasis added.

Due to the Director=s decision to refuse to accept EDS= recommendation to Aaccelerate the nation-wide deployment of TAAMS title@ even in light of the Secretary=s acceptance of this recommendation, the Court Monitor spoke with both Swimmer and Erwin as well as with the EDS Project Manager. Their general statements about this decision centered on the fact that EDS had never tested the current title software, the May 2001 Integrated User Acceptance Tests had shown it to be questionable, and there were questions regarding its development and ability to be deployed even in the limited role it is performing in Billings. As evidence of this changed position by EDS, their ATrust Reform, Final Report and Roadmap,@ dated January 24, 2002 and filed with this Court on January 25, 2002, contains a AClarification to Interim Report Published November 12, 2001@ regarding TAAMS Title acceleration (*see* page 87 extract at **Tab 6**). That clarification states in part:

A=Accelerating title,= means focusing existing resources on the data cleanup activities required to support the nation-wide deployment of core title functionality.

It is important to note the recommendation is not predicated on the introduction of new features or functions in the title module. It was specifically stated that the decision for enhancements should be made based on the costs and the associated benefits. If the costs outweigh the benefits then EDS recommends deferring further development and utilizing the current version as an interim solution.

As recommended in the Interim Report, the Department needs to develop a trust business model. Based on the business model, the Department needs to identify and evaluate appropriate information systems. Information system alternatives should include TAAMS, commercial applications, service bureau, outsourcing and modifications to existing legacy systems. Until this analysis is complete, the Department should continue to leverage TAAMS title.@ *Id.*

Interested to know what the new term Aleverage@ meant, the Court Monitor inquired of the project manager as to whether that term also meant deploy the system to other locations. The term Aleverage@ addresses the software within TAAMS title that incorporates the fractionalization calculations. As this application would have to be developed in any new system bought or designed to handle title work as it is unique to the IIM trust, one reason for further evaluating the possible retention of at least part of ATS= title software is this critical function that has already been developed and may save money and time if it can be integrated with whatever final system is selected by Defendants. Until that is determined, EDS believed Defendants should maintain at least this function until their later decision on the overall system requirements for trust reform. EDS did not mean to indicate in their previous reports that TAAMS title software was tested and found capable of meeting all user requirements or should be deployed to new locations without further stringent testing.

G. BIA Data Cleanup

This section begins with a description of the project and the statement by the subproject manager that ADataCom performs the majority of the cleanup work.@ However, he added to this assessment that A(t)he reader should not assume that BIA is not involved in the work or that their effort is not being reported.@ *Id.* at 79.

To buttress his claim that DataCom is performing the majority of the cleanup work he lists eight pages of tasks being performed by DataCom.
The Deputy Special Trustee, having reviewed this subproject, makes the following remarks among others:

AAssessment of sub-project

1Definition of project not well formed
2Universe of work not established prior to inception
3Prioritization based on data migration requirements rather than fiduciary responsibilities
4Interdependencies with other trust reform efforts not established
5Inadequate project management
6Inadequate direction and performance metrics for contractor tasks
7BIA Project teams unrealistic expectation that BIA staff performing daily operations can also develop cleanup plans, oversee contractor, and verify and substantiate work@ *Id.* at 89.

She outlines a new Acourse of action@ stating in part:

1ARedirect contractors to concentrate on established data issues while developing the nation-wide deployment plan
2Develop consistent, nationwide strategic project plan to include:
3Adequate balance between government and contract personnel
4Interdependencies with other projects, e.g., records management and historical accounting.
5Segregate data conversion from data verification
6Determine the universe of data in need of verification
7Modify and redirect contract to incorporate national plan, changed priorities and performance metrics@ *Id.* at 90.

The Deputy Special Trustee=s Observations as well as those of EDS confirm the past Reports of the Court Monitor on the dismal status of this immense project and the lack of understanding of the parameters of the project by the subproject manager. The Special Trustee=s Assessment of the subproject includes the statement: AWork to date demonstrates the dedicated effort of *scores* of DOI employees,@ which highlights the misguided reliance placed by the Subproject Manager on reporting the DataCom task=s completion levels as if this report covered all of the work that was being accomplished or adequately addressed the monumental amount of work left to be done.[10]

[10] Again, if past BIA Data Cleanup subproject reports have been inaccurate and incomplete, their truthfulness may also be at issue whether or not this particular Subproject Manager had the knowledge or ability to determine or understand how much information he was not reporting. A cursory examination of the status of this project has allowed the Deputy Special Trustee to put this subproject=s dismal status in its proper

1 Appraisals

Having commented on the status of the Appraisals subproject in the Fourth Report of the Court Monitor, it is necessary to touch on it once again. A review of the AThe BIA Appraisals Chapter@ of that Report at pages 16-19 provides some background for the present review of the Eighth Quarterly Report=s Appraisals section.

Since the Third Quarterly Report filed with this Court on August 31, 2000, the Special Trustee has criticized the lack of independence and integrity of the BIA Appraisal staff that are under the direct supervision of the Regional Directors or their subordinate managers, creating a severe conflict of interest. The BIA has opposed transfer of the supervision of the staff to the Chief Appraiser in Washington, DC.

As addressed in the Court Monitor=s Fourth Report, on August 15, 2001, a year later, the Special Trustee refused to accept the status quo by stating in a memorandum to the BIA staff:

> ***AThe appraisal process and the appraisers remain under the control of the BIA Regional Director or Agency Superintendent and the Chief Appraiser=s role has become merely advisory in nature. That officer has no authority to effect action and, therefore, has no responsibility for the appraisal process.@*** *See* Tab 14 at 1, Fourth Report, emphasis in original.

He further stated his position by advising the BIA that:

> ***AAppraisers should not report to or be supervised by those in the Regional or Agency offices who are either directly or indirectly responsible for investment decisionsY.***
>
> **The BIA Chief Appraiser should have full responsibility for and line authority over the appraisal process and the appraisers in the field. Alternatively, the Department may create the position of Chief Appraiser for Trust Assets in either BLM or the Office of the Inspector General with line authority over the appraisers in the field.@** *Id*. at 2, emphasis in original.

The response of the BIA in the Seventh Quarterly Report, in part, was the following:

> **AThe BIA has indicated that it welcomes the Special Trustee=s comments and will work cooperatively with the Special Trustee to structure the process properly. The Special Trustee expects that the process to realign the appraisal authority be undertaken without delay.@** *See* Fourth Report at 18; Seventh Quarterly Report at 23.

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perspective in one month=s time. Why could no DOI and BIA senior manager do the same and report accurately on it to the Court when they must have been aware of the Special Trustee=s concerns about this project?

But it did not occur. On November 8, 2001, the Assistant Secretary B Indian Affairs wrote to the Special Trustee in a memorandum entitled, ARealignment of Bureau of Indian Affairs (BIA) Appraisal Function to Office of the Special Trustee (OST)@ (**Tab 7**) stating that:

AIn the Fourth Quarterly Report in your observations, you stated, AThe Special Trustee is concerned that the independence and integrity of the BIA appraisal staff be established in accord with the Uniform Standards of Professional Appraisal Practice. The Special Trustee supports the division of responsibility between realty officers and appraisers to avoid any real or apparent conflict of interest.

You and I have discussed how best to accomplish the necessary division of responsibilities. I have continued that discussion with BIA Deputy Commissioner and Director, Office of Trust Responsibilities, and they support a transfer of appraisal function to OST consistent with the recommendation of the Chief Appraiser. ***I have also been informed of instances where undue influence was a perceived problem.***

At this point, I am in complete agreement that the appraisal function needs to be relocated outside of BIA. I further agree that placement of this function in OST is an appropriate way to ensure appraisal integrity. I seek your concurrence under the authority given you in Secretarial Order 3232.

If you concur, our staffs with the assistance of the Solicitor=s office can prepare the necessary action documents.@ *Id.,* emphasis added.

The Special Trustee concurred. The Assistant Secretary=s citation to Secretarial Order 3232 regarded the July 10, 2001 order by the Secretary giving the Special Trustee added authority over the direction of trust reform that stated, in part:

AIf, after consultation with the head of any bureau or office of the Department, the Special Trustee determines that any policy or practice that is within the control of such bureau or office either hinders or may hinder trust reform, the Special Trustee, with the advice and counsel of the Solicitor=s Office, may issue written directives detailing the appropriate change in policy or practice. Unless the Secretary disapproves such directive in writing within 30 days of issuance, the directive of the Special Trustee shall have the force and effect of a Secretary=s Order.@ *See* Fourth Report at 18 and Second Report, Tab10I.

On November 8, 2001, the Special Trustee, in concurring with the Assistant Secretary=s memorandum, issued a de facto Secretarial Directive under Secretarial Order 3232.

For whatever reason he felt it necessary, over a month later, on December 19, 2001, he issued a directive on the same subject. On that date, he sent a memorandum, entitled, ABIA Appraisals,@ to the Assistant Secretary B Indian Affairs attaching a ADirective of the Special Trustee@ and copied it to the Secretary and Deputy Secretary (**Tab 8**). The Directive stated in part:

AI direct that, in order to ensure consistent management and oversight of the appraisal process, the Bureau of Indian Affairs Appraisal Program be realigned by transferring the Bureau of Indian Affairs Chief Appraiser and

line authority for the Bureau=s appraisal program to the Office of the Special Trustee. The purpose of this realignment is to better promote the objectivity, independence, professionalism, leadership, accountability, and oversight of the appraisal process in order to better serve the interests of the beneficiaries and enable the Department to better protect itself form breaches of trust.

This Directive follows consultation with the Solicitor and the Assistant Secretary of Indian Affairs. The Secretary and the Deputy Secretary are also aware of the wisdom of this realignment.@ *Id.*

Which brings the issue back to the Eight Quarterly Report=s review of the status of the Appraisal subproject. It should be noted that it is now over 30 days since the Directive was issued and over 60 days since the de facto directive was issued with the Special Trustee=s concurrence to the Assistant Secretary=s November 8, 2001 memorandum cited above.

The Subproject Manager=s Observations, page 113-114, discuss that November 8, 2001 memorandum and the actions taken by the BIA in response to it. A Apreliminary@ plan has been drafted, a final plan is to be drafted following approval of the budget, personnel and facilities, and other unspecified issues. Staff from BIA were detailed to the Office of the Special Trustee in December 2001 to assist in effecting the transfer of the appraisal function. The Assistant Secretary of Indian Affairs has issued a memorandum directing the transfer and the actions associated with it.

But the next two paragraphs in the Appraisals section on page 114 are problematic:

Currently, the need for tribal consultation (Milestone K in the 5th Quarterly Report) for realignment of the Appraisal function is being reviewed to determine if consultation is necessary to implement internal management changes regarding Appraisal reporting.

The Subproject Manager agrees with the EDS observations. In this regard, DOI is preparing the necessary action documents to formally implement this change in line authority. ***The Subproject Manager notes that the realignment issue has been pending for over a year and recommends immediate transfer of the Appraisal function to OST.*** *Id.,* **Tab 5** at 114.

If the Special Trustee has issued a Directive that has not been countermanded by the Secretary **B** and this first such Directive was not **B** his Directive is now a Secretarial Directive. Why must the Subproject Manager encourage Aimmediate transfer@ and the BIA review the need for tribal consultation? This was planned for as far back at least as the time of the publication of the Fifth Quarterly Report on February 28, 2001. The Special Trustee had consulted with the Solicitor=s Office prior to issuing his Directive on December 19, 2001. Why would the BIA again hold up the transfer?

This question was put to the Special Trustee. He has recently been told that the Solicitor=s Office has informed the BIA that they are reviewing the need for such consultation once again.

In the meantime, the EDS Observations catalogue the results of this failed realignment and other appraisal tasks:

AThe Appraisal Backlog Elimination subproject had 12 specific tasks of which nine are identified as completed or ongoing and three tasks are identified as not completed. Significant efforts were made by the subproject manager and regional appraisal staff to address and fulfill the requirements of the various tasks. ***However, even with these efforts and a majority of tasks completed, BIA=s Appraisal Program still experiences a backlog of appraisal requests (current estimate is 1,500) and does not appear to have firmly established bureau-wide standards for valuation practicesY.***

Additionally, describing some of the tasks as completed raises the question of whether certain activities were performed to >check off the box= for the task. ***It is questionable if there were permanent improvements in the organization=s operations and processes considering the ongoing issues with backlogs and standardization of valuation practices.@*** *Id.* at 118, emphasis added.

EDS also proposed that BIA explore the option of outsourcing the appraisal services in light, presumably, of their concern that the present internal appraisal function cannot successively complete the tasks allotted them to cure the backlog and realignment problems. *Id.* at 118.

Nonetheless, the Subproject Manager Comments on the EDS and Special Trustee Observations regarding these two recommendations is enlightening:

AThe Subproject Manager recommends that EDS recommendation of realignment of line authority and outsourcing of appraisal services be separated and not addressed as the same issue. ***These are complex issues that require detailed examination*** **to determine what is in the best interest of trust reform.@** *Id.* at 119.

Need more be said about why a transfer or outsourcing of the Appraisal services is necessary? But can the Special Trustee or even the Secretary cause one or both to happen as long as the BIA plays a role in the planning and operation of this function and continues to drag its heels over a realignment decision that its Regional Directors and Agency Superintendents do not support?

I. Probate Backlog

Prior Court Monitor Reports have not addressed probate issues. However, due to the concern of the Special Trustee for this project=s status and the comments of EDS and the Special Trustee concerning the critical harm caused by it to IIM account holders, review of the reasons for these problems is necessary.

The section begins with a summary of the problem:

ADue in large part to the increasing numbers of fractionated interests in trust assets, probate cases in BIA regions with high concentrations of allotted lands have become backloggedY. (T)his situation is further exacerbated by the fact that both BIA and the Department of the Interior=s Office of Hearings and Appeals (OHA) lacked sufficient staff exclusively dedicated to probate case work, and that no uniform procedures for facilitating timely processing existed. ***As of February 29, 2000, the***

Department estimated a ›backlog= of approximately 15,000 actions, which includes probate casesY. The Department had also estimated a backlog in the distribution/redistribution of Youpee interests/estates at 178,000 interests in 13,000 estates.

The two primary objectives of the probate subproject are to eliminate the backlogs and to prevent future backlogs.@ *Id.* at 102.

There follows a discussion of the number of cases Aprocessed and decided@ and Aposted and recorded.@ Between August 1, 2001 and December 31, 2001 1,785 cases were decided and the workload remaining was 2,429. Of the 5,400 backlog cases Arequiring preparation@ 5,339 remain.

The backlog of posted and recorded cases at the start of the reporting period was 3,161 and 1,654 cases remained at the end of the period. *Id.* at 103-104.

The Subproject Manager=s reasons for this state of affairs, in summary, include the Temporary Restraining Order issued December 5, 2001 that stopped all contractor work due to lack of access to the LRIS system and TAAMS title system. Also, major factors that have slowed progress were the contractor=s Asteep learning curve, shortage of staff of the BIA the contract/compact tribes, and contractors to assist in the probate effort. The overall recurring roadblock, in the opinion of the Subproject Manager, is the Alack of human and financial resources.@ *See* generally, pages 105-107.

EDS saw the core problems somewhat differently in its Observations:

A*There was some evidence of planning efforts for the individual probate backlog areas. However, the lack of a coordinated, near-term plan and deadline for the complete elimination of probate backlogs covering all five specific areas is, in large part, responsible for the overall lack of sustained, across-the-board probate backlog elimination. In addition, inadequate funding has reportedly been a cause for the lack of probate backlog elimination progress. The failure to ensure prompt, coordinated, complete, permanent and near-term probate backlog elimination arguably violates the fiduciary duty owed by the DOI to the Indian Trust beneficiaries.*

The incremental approach to probate backlog elimination serves only to shift the burden of backlog elimination among the five areas.@ *Id.* at 108.

The Special Trustee=s Observations were even more succinct:

A*More effective control of the probate processing should be initiated to track and process a probate case from end-to-end. In other words, a single person should be accountable for the probate of specific accounts and ensure completion of the process. Reorganization of this ongoing activity, therefore, is necessary.@* *Id.* at 109**.**

Donna Erwin, the Special Deputy Trustee with oversight authority for this project again had a more detailed analysis of the problems:

1Plans do not address interdependencies with other agencies and other projects

2Definitive project end state has not been sufficiently defined
3Distribution of funds accumulated during the probate process and updating ownership records in the realty income distribution should be but has not been the primary goal of this subproject
4Funding requirements have not been anticipated nor fully forecasted for out years
5Adequate performance metrics have not been defined for contractor tasks
6Metrics do not encompass entire business process from date of death through date of distribution
7Inadequate project management@ *Id.* at 110-111.

Erwin did not dispute that there were a lack of resources or that part of the problem was the lack of universal agreement throughout DOI about needed business processes and end state of the project and that there will need to be a complete reengineering of the business processes to meet DOI=s fiduciary duties. However, the constantly heard refrain from BIA managers that the major causes of their inability to make progress on trust reform are the lack of people and resources was debunked by EDS, the Special Trustee=s and her Observations.

At the lowest common denominator, the problem of resources and funding is an issue of the lack of experienced management who can properly plan and execute the probate function. Had they done so in the past, the resources would have been recognized and the people provided and trained. But there has been no recognition of or acceptance by BIA senior management of these core issues. Nor has the Court been informed of them sufficiently even though the Special Trustee has attempted to in his Observations in past quarterly reports.

J. Accounting

This section is new to the quarterly report format. It addresses the admission made to this Court and addressed by the Court at page 82-83 of its December 21, 1999 decision. Specifically, the Defendants admitted that they must comply with Congress= mandates in the 1994 Reform Act, 25 U.S.C. Section 4011 (a) **B** (c); Section 162a(d) (1) **B** (7) regarding the financial management of the IIM trust.

In addressing this stipulation, the Defendants point out that they are not in full compliance with these mandates. Generally, the section=s statement that A(w)hile each quarterly statement contains the beginning balance for the reporting period, the initial account balances have not been verified@ addresses the major problem with Defendant=s inability to comply with the 1994 Reform Act and the seminal cause of action in the *Cobell v. Norton* litigation **B** namely, Defendants have not reconciled the balances of the IIM account holders= accounts by completion of an historical accounting. *Id.* at 53.

The Special Trustee asserted in his Observations in answering the question Ais there an accurate accounting provided to the beneficiaries, individual and tribal@ by stating that:

AWhen one inspects the accounting responsibilities for trust assets under the law applicable to Indians trust, the answer is basically >no=. *Id.* at 12.

The only solution proposed by Defendants for this lack of compliance is that the Office of Historical Trust Accounting Ais tasked with *establishing the accuracy of the balances in the IIM accounts* and it is envisioned that other DOI systems initiatives should provide the non-financial investment source of funds information (allotment description, lease numbers, etc.).@ *Id.* at 53, emphasis in original.[11]

K. Departmental Reorganization

The Eighth Quarterly Report also addresses the proposed Secretary=s Reorganization of the DOI and the planned creation of the Bureau of Indian Trust Asset Management. This BITAM plan of reorganization has been reported to this Court[12] and is the subject of ongoing consultation with the Indian Tribes and proposed or scheduled hearings before Congress. It is addressed in this Report to update the Court on the status of that reorganization and the concerned parties= views of its legitimacy and potential for positive change in trust management and reform.

In summary, the Defendants report that:

AA major objective of the Department is blending private trust standards with the guiding principle that tribes have a government-to- government relationship with the United States.

Y.

The Department believes that the government=s Trust responsibility and tribal sovereignty are positive, complimentary forcesY. The need to achieve a responsive land efficient discharge of the trust responsibility while balancing the Department=s commitment to administering the government-to-government relationship with Indian tribes by supporting tribal sovereignty, tribal self-governance and tribal self-determination, as expressed by Congress is a tremendous challenge. It is thus necessary to consider the unique relationship between the Tribes and the Federal Government as the Department proceeds with trust reform and the reorganization process and the adoption of appropriate policies and procedures that address the sometimes competing principles.

Prior to implementation of the proposed plan, the Secretary directed Interior staff to consult with Congress, Tribes, and Interior personnel and their unions. Affiliated aspects of the reorganization, include an expectation that OST would continue to monitor and provide oversight of the

[11] The OHTA is not charged with determining even when this will be accomplished. The Ahow@ will supposedly be submitted to Congress in a Comprehensive Plan expected to be completed by OHTA in the middle of this year. Whether Congress will approve that plan or it will be sufficient to establish the accuracy of the IIM account balances is unknown. *See*, generally, Fifth Report of the Court Monitor.

[12] *See* ANotice of Proposed Department of the Interior Reorganization To Improve Indian Trust Assets Management@ filed November 14, 2001.

Department=s trust responsibilities; the Office of Indian Trust Transition would provide leadership for continuing trust reform efforts; and, other non-trust services to Indian Tribes would continue to be provided by the Bureau of Indian Affairs.

Two consultation sessions were completed during this reporting period. The Tribes generally opposed any reorganization. The reason cited for opposing the reorganization proposal centered upon the consultation process itself. The Tribes have suggested the formation of a Task Force as a meaningful way to further the consultation process. She further agreed to provide resources to the Task ForceY.

One of the first tasks of the team under the Office of Indian Trust Transition will be to develop the strategic plan.@ *Id.* at 19-20.

Subsequent developments regarding BITAM and trust reorganization that bear reporting to this Court for its consideration in line with the outstanding motion of the plaintiffs for the appointment of a receiver are the following:

The Defendants have now held a number of consultation meetings with the Indian Tribes and will meet with them or the 24 person Tribal Task Force on several more occasions. All reports continue to indicate strong opposition to the BITAM reorganization by the Indian Tribes.

The Court has been provided a ANotice of Filing of Position Statement on Indian Trust Reform, December 2001, Adopted By The Advisory Board To The Special Trustee For American Indians (**Tab 9**). The position statement of the Special Trustee=s Advisory Board[13] also opposes the Defendants= planned reorganization in favor of a proposal that:

A(T)he Indian trust assets and fiduciary aspects thereof be extracted completely from the DOI and placed in an independent agency reporting to Congress. This in no way would adversely impact self governance/compacting. That agency should be charged with administration of Indian trust activities at a commercial standard, comparable to that achieved by our most prominent private providers of fiduciary services. In order to achieve a commercial standard, the agency should be empowered to hire personnel on compensation terms applicable in private industry, free of restrictions affecting Executive Branch agencies. Additionally, the new independent organization should be entitled to outsource trust administration activities to reputable third party providers. Finally, so as not to distract it from its trust responsibility, every effort ought to be made to limit the responsibilities of the trust agency to trust activities. (We do not advocate extracting other Indian programs from the DOI.)@ *Id.* at 4.

Plaintiffs weighed into the discussion on the impact of the Defendants= proposal. In addition to their filings with this Court, they have submitted an undated AOpen Letter to Indian Country@ entitled, ATRUE REFORM FOR THE IIM TRUST@ (**Tab 10**). The discussion of the subject is prefaced by a subheading to the letter entitled, AHow a Receiver Will Fix the Problem.@ The letter=s paragraph headings summarize their position with respect to the differences in the impact of the BITAM and the proposed appointment of a

[13] The Chairperson of this Board is Elouise C. Cobell, the named plaintiff in the *Cobell* litigation.

receiver on Indian Tribes:

1ADoing nothing is not an option.

2Receivership will involve only the IIM trust. Interior=s proposal includes tribal trust funds and resources.

3Receivership would be temporary. Interior=s plan would be permanent.

4A receiver will act in the best interests of trust beneficiaries. Interior=s plan leaves ultimate power in the hands of the Secretary.

5The government=s reorganization is not the centralization of authority that it claims to be.

The House Committee on Resources has also scheduled a hearing at which it will address the reorganization and other trust issues. In a January 15, 2002 letter to the Secretary (**Tab 11**), the Chairman of the Committee, The Honorable James V. Hansen, stated that:

AThe Committee on Resources will hold an oversight hearing on Indian Trust Fund Accounts, the Department of the Interiors Restructuring Proposal and the Impacts of the Court Order Closing Access to the Department=s Computer System. The hearing will take place on Wednesday, February 6, 2002, at 10:00 a.mY.

The hearing will focus on the status of individual and tribal Indian trust accounts and how the Department of the Interior is responding to issues raised in the class action lawsuit, *Cobell v. Norton*.@ *Id.* at 1.

In addition, on November 20, 2001, the Chairman and Ranking Minority Member of the House Subcommittee on Interior and Related Agencies wrote to the Deputy Secretary, J. Steven Griles, and stated the following:

AAs you are aware, this Committee has appropriated over $20 million of the taxpayers money for an historical accounting of the five named plaintiffs and their predecessors in the Cobell v. Norton case. We are keenly interested in the results of this historical accounting study to determine whether this expenditure was a wise use of appropriated funds, and to serve as a benchmark to determine any future appropriations for this type of activity.

Y.

The Committee is considering holding an oversight hearing on trust reform, including the issue of an historical accounting, early in the next sessionY.@
Id.

Cleary, the issue of the planned Indian Trust reorganization and other issues presently before this Court could well be affected by outside interests and forces beyond the control of the Secretary. The Court=s review of the proposed reorganization, as envisioned by the Secretary and presently being addressed by her and her senior staff including the Director, OITT, may need to take into account these interests and forces when evaluating the ability of the Secretary to bring about the requisite trust reform envisioned by this Court in its December 21, 1999 decision.

III. ANALYSIS

A. The Process

It must be pointed out, initially, that the Eighth Quarterly Report would not have taken this format had the Secretary=s request to the Court to substitute the EDS reports for her own report been accepted by this Court. The Secretary=s request took the form of a AMotion To Permit Filing Modified Form Of Trust Reform Status Report For the Period Ending October 31, 2001.@ That motion and the accompanying Memorandum in Support were filed on November 26, 2001 (*See* **Tab 2**). The reasons for the Secretary=s request to substitute the EDS reports for the Eighth Quarterly Report can be summarized by referring to this Memorandum:

> **ABecause Interior now recognizes significant weaknesses in its ability to perform certain core functions, it makes more sense for Interior to proceed with correcting the weaknesses than to prepare a report on previous efforts that its experts deem inadequate. This is an illustration of the depth of insight provided by EDS B and why its reports will provide the Court with a clear and independent picture of trust reform.**
>
> **Interior=s internal assessment and the EDS= reports confirm that the decentralized management approach employed by Interior under the HLIP has demonstrable shortcomings. It would be counter-productive to continue with the traditional quarterly report when the Department is establishing a new direction in trust reform, as evidenced by the EDS effort, the Department=s endorsement of key EDS recommendations, and the Department=s reorganization of trust management and reform.@** *Id.*. at 18-19.

This Court held a hearing on December 14, 2001 on the Secretary=s request to substitute the EDS reports, whose recommendations she had informed this Court had been accepted, along with reports on the OHTA and reorganization that she had already filed with this Court (*see* transcript extract at **Tab 13**). The parties= counsel stated their positions. First, the Plaintiffs= counsel, Mr. Gingold:

> **AThe order was narrowly limited. None of the disclosures that should have been made to this Court have been made. We do not think in the context of, as Mr. Nagle pointed out, in a court of equity that anyone with clean hands should be able to take advantage of their self-inflicted injuries and their malfeasance by trying to escape exactly what this Court ordered these people to do two years ago, and they haven=t done it once.**
>
> **We believe it=s essential that the quarterly reports that were ordered on December 21, 1999 be filed and that they be accurate and complete, and until this Court determines how to go forward with this case, whether receiver or otherwise, that along with some investigative abilities of the court monitor and the continued activities of the Special Master is the only way this Court will have a glimpse of what=s really going on with regard to the Trust.**
>
> **We think this Court intended to rely on the good will and good faith of the defendants to do what they represented they would do. They have not done**

it yet. We believe that strict compliance with the December 21, 1999 order is in order, and not any relief whatsoever, Your Honor.@ *Id.* at 906-907.

Next, the Defendants; Mr. Kohn:

AYour Honor, we filed the motion to substitute in recognition of a variety of events that have taken place. The EDS reports have been reported. We filed those with the Court. We have adopted those findings. The Secretary adopted those findings and has proceeded with the creation of a new unitary office to assume responsibility for trust reform as recommended by the EDS report, as recommended by the court monitor as well.

We filed with the Court, as we indicated when we filed our earlier motion, the subsequent EDS report that was filed on December 6th, we file it B I guess we got it that afternoon. We filed it with the Court the very next morning. It, too, reports on the current status of trust reform.

We filed the reports of the Office of Historical Trust Accounting which provides information on the progress that is being made by that office, in its creation and the steps that it has taken since its creation a few months ago.

We have filed with the Court declarations explaining the reorganization that is taking place in an effort to improve trust reform.

The concern that we have we had the eighth quarterly report before us is partly the format of previous quarterly reports. It reported on particular steps in the HLIP. And those steps have now become - - well, *anachronistic*, if you will, because we have determined that the overall package of which these are reporting on dozens of small steps. It=s taken our eye off the ball. We=re moving forward with a reorganization of the entire effort, and we want to provide the Court with accurate, complete information on that, and that is whey we filed what we did, Your Honor.

THE COURT: Well, the format of that report was decided on by Interior, and I=m wondering why the Interior Department could not provide a quarterly report of - - that complies with my order in whatever format is required.

In other words, if you had to change the format because you don=t - - you=re not following the HLIP any more and you don=t have those timetables and so on any more, there=s nothing in my order that compels what the format has to be. So why couldn=t the Secretary go ahead and submit this eight quarterly report in whatever format was appropriate that gave the information that was required by the December =99 order?

The EDS reports don=t substitute for it because they don=t cover everything@
Id. at 906-909, emphasis added.

Gingold replied:

AYour honor, I don=t recall anything in Mr. Griles= affidavit that talks about the steps taken by the defendants to bring themselves into compliance with the requirements of the Trust Reform Act of 1994. I don=t recall that Mr. Griles declarations state the steps taken to correct the breaches identified in

this Court=s opinion. That is the basis of the December 21, 1999 order, not a consultant=s report, and Your Honor, as we have seen, there have been dozens of consultants= reports that have been provided to the Secretary of the Interior at the cost of millions and millions of dollars and nothing has ever occurred.

The reports are not to tell the Court what they plan to do in the future; they are to tell the Court what steps have been taken, to do exactly what we have been discussing for five days.

The problem that may be more significant, that underscores what you just heard from the Secretary=s counsel, is she doesn=t know what has occurred here. That is perhaps the most damning indictment of them all. But, nevertheless, until or unless this Court takes direct oversight and until the Secretary reports to this Court candidly, accurately and completely, and until counsel, pursuant to the ethical requirements, conduct the due diligence necessary to provide this Court with reports that are complete and accurate, you are never going to know what the status of whatever the newest version of the trust asset and accounting management system is, and you are never going to know how the trust funds are being protected. And, Your Honor, EDS doesn=t address the legacy systems at all. The 154-page report of the Special Master principally deals with the legacy systems and EDS doesn=t discuss it for one page, one sentence.

How does this comply with this Court=s December 21, 1999 order, especially the problems that go to the actual integrity of the trust itself? It doesn=t do it. We believe it=s absolutely imperative that some discipline be imposed on the Secretary and the Assistant Secretary to report accurately and candidly. They have had this responsibility for two years. They haven=t done it, and we don=t believe they should be relieved of the responsibility because they say they can=t do it now. Your Honor, we believe the trustee must do it and they must find a way to do it, and if they don=t have the resources, they should go to Congress and get those resources.@ *Id.* at 910-912.

On Monday, December 17, 2001, this Court signed an order requiring the Defendants to provide an Eighth Quarterly Report of their own construction rather than rely solely on the EDS reports and others about the reorganization and the OHTA preparation of the Comprehensive Plan. The Court did not state its reasons in requiring this. It did give the Defendants until January 17, 2002 to comply with its December 21, 1999 order requiring quarterly status reports be filed with it and the plaintiffs.

Based on these arguments it can be assumed the Court was not limiting the Defendants to any specific form of report as long as they complied with the intent of its December 21, 1999 language as quoted again in the December 17, 2001 order. That language had required them to set forth and explain Athe steps that defendants have taken to rectify the breaches of trust declared today and to bring themselves into compliance with their statutory trust duties**Y**.@

Also, this Court required the Secretary to do what the Plaintiffs, the Special Master, and the Court Monitor had alleged in a plethora of filings had not been done **B** provide a complete, accurate and truthful report on *all* requisite steps taken to comply with the Court=s order, the 1994 Reform Act, and other applicable statutes. Defendants had alleged that their past

quarterly reports, including the Seventh Quarterly Report, were all of the above; and that the EDS reports had not cast any doubt on the Seventh Quarterly Report=s accuracy, completeness or truthfulness.

The problem for the Secretary, as can be clearly seen by a cursory reading of the Eight Quarterly Report, was that past quarterly reports had not come close to complying with the December 21, 1999 order of this Court. They had not reported on all matters involving their responsibilities and duties regarding trust reform such as the historical accounting, IT security, and those accounting procedures that were required by the 1994 Act. Nor had the EDS report addressed all of the requisite trust reform projects.

The process that the Secretary decided upon in order to address the Court=s order and file a meaningful Eighth Quarterly Report was to involve practically her entire senior staff. They had to compile the subproject reports, add the new reports, and establish as great a degree of confidence as possible in their accuracy, completeness and truthfulness. To do that, the Secretary required all subproject managers be interviewed by a team of officials, headed by the Director, OITT, and including EDS representatives, DOJ and Solicitor attorneys, the Special Trustee and the Deputy Special Trustee. At times, the Deputy Secretary, the Associate Deputy Secretary, and the Assistant Secretary **B** Indian Affairs played substantive roles in this process. The Secretary also participated in the final compilation and review of the Eighth Quarterly Report.

In the opinion of the Court Monitor, the process and the product, relative to past quarterly reports= preparation and content, is far superior in transparency to any of the past seven quarterly reports. It exhibits a level of apparent candidness and completeness not seen in any of the past reports or the revised HLIP.[14] However, it also shines an extremely harsh light on not only the status of past trust reform and trust management efforts but on those past quarterly reports regarding their low level of accuracy and completeness. It also reveals that Mr. Gingold was prophetic when he stated to the Court:

A The problem may be more significant, that underscores what you just heard

[14] This is not to overlook the fact that the Secretary did not take on this chore willingly and that her counsel attempted to persuade this Court to accept an outside consultant=s reports on some trust reform activities based on the consultant=s limited (in time and scope) review of the work and interviews of her subordinates **B** a job her own senior managers had neglected to effectively carry out in the past. The obvious discrepancies between the trust reform status reported in the Seventh Quarterly Report and the EDS reports of major failures in TAAMS and BIA Data Cleanup, to mention only two subprojects, mandated that the Secretary reconcile her subordinates= unverified claims with the more thorough and objective report by EDS.

from the Secretary=s counsel, is she (the Secretary) **doesn=t know what has occurred here.@** *See* transcript at Tab 11 at 911.

Either their subordinates played the senior political managers in the present administration for fools or those same subordinates did not know what was going on in the projects within their responsibility and did not challenge their project managers= reporting. It is evident from the Eighth Quarterly Report=s reviewing officials= statements that they learned, perhaps for the first time, that they were not aware of the full extent of the nightmare they faced and the Secretary had not been fully or accurately apprised of it. However, this time, to ensure the Secretary, who was ordered by this Court to sign this quarterly report, knew the whole story, they did what no senior manager did previously (other than the Special Trustee); they held their project managers accountable for what they reported and attempted to verify what those managers had reported on the status and progress of their projects. They did not accept on face value, as apparently was done wholesale in the past, what they were told.[15]

The success of the Director and the Deputy Special Trustee at uncovering a truer story of trust reform is tempered by a number of questions. Why did the Defendants fail to carry out this level of review before? Why did they refuse to accept either the Special Trustee=s or the Court Monitor=s observations about the lack of credible information in the quarterly reports, at least to the extent of closely checking what they were told of trust reform status and progress? Also, in light of the patently obvious unreported failures of some of the trust reform projects, why have they defended so ardently the indefensible? The potential answer to these questions may not augur well for the future of trust reform even under a new organization. If the political leadership of DOI or their attorneys continue to take a Abunker@ approach to reporting to the Court, this Court=s ability to monitor trust reform progress will still be hampered.

It must be remembered that the Special Trustee, even with this concerted effort to verify the complete trust reform picture, does not believe the Eighth Quarterly Report=s information on the status and progress of trust reform, to include the planning for the future, is completely understood or reported by the Defendants. How well the Defendants unravel the management, expertise, and communication deficiencies in the future may well determine how accurately they can report to this Court and the IIM account holders.

Examples of the newly reported trust reform failures that must now be dealt with as part of the reorganization plans can be addressed briefly and have already been highlighted in this Report=s review of the Eighth Quarterly Report.

1 The Introduction

[15] The major credit for this process= success must be given to the Director, OITT and even more, in his view, to the Deputy Special Trustee, Donna Erwin, who was the official placed in charge of TAAMS, BIA Data Cleanup, and Probate as well as to spearhead the review of the remaining projects. Her involvement with the OITT provided the only actual trust experience in the transition team. Her accomplishments are somewhat magnified by what they have to be judged against **B** the past quarterly reports **B** but still deserve recognition for her in depth analysis of these projects in the very short period of time available to her for her review. Her observations and planned courses of action bring integrity and insight to these important projects and to the content of the Eighth Quarterly Report. But the fact she is the only experienced trust official within the management team addressing the major reorganization ahead of them is not a positive.

ASome milestones have been achieved; some have not been achieved; some have been reported as complete, but little seems to have been accomplished.@ Milestones that Asimply do not reflect the true status of trust reform.@ AThe format of the HLIP did not encourage reporting on lack of success or the need for additional resources or efforts.@ *See* **Tab 5**, at 4-5.

It could be better said that the chosen format **B** to follow the HLIP **B** gave those intent on covering their tracks a perfect mechanism for avoiding reporting failure. If a milestone had not been reached and failed efforts to reach it did not need to be reported, why report a failure that would only later delay the milestone? Why report bad news not even required to be addressed by any milestone?

The argument has been made by the Secretary=s counsel in the AInterior Defendants= Response To The Court=s Inquiry In the Order To Show Cause Dated November 28, 2001@ (*See* **Tab 3**) that:

> **AThe EDS Report does not render inaccurate Quarterly Status Report to the Court Number Seven (ASeventh Quarterly Report@), but it does identify shortcomings, some quire substantial, in the overall strategy for accomplishing trust reform that Interior had pursued before its receipt of the EDS ReportY. Thus the efforts described in the Seventh Quarterly Report related to the milestones that the Revised HLIP had defined as necessary to accomplish trust reformY.** ***The Seventh Quarterly Report=s description of particular steps taken to accomplish the Revised HLIP was not rendered inaccurate by this change; but much of it was, instead, rendered obsolete.***
>
> **Y.**
>
> **The EDS Report provided Interior with information it did not have before the filing of the Seventh Quarterly Report B** ***an objective assessment of the current status of the TAAMS and BIA Data Cleanup subprojects from an outside source with no involvement in the decisions leading to adoption of the original strategy.@***

The argument is fallacious. The subproject managers and certainly the senior DOI and BIA management had the benefit of many independent Aoutside sources@ telling them of the severe problems with projects such as TAAMS **B** their consultants, the GAO, the Court Monitor and, internally, the Special Trustee. The EDS report did not Arender obsolete@ the HLIP; it put the lie to what the DOI senior political management was allowing to be reported in the quarterly reports by subordinates without so much as systematically checking on the information=s veracity. What had been rendered Aobsolete@ or Aoutdated@ or Aanachronistic@ was any faith by the IIM account holders in the ability or willingness of the Defendants to tell the truth to them or to this Court.

But what about the Introduction=s statement that the past quarterly reports= milestones did not Areflect the true status of trust reform.@ There is not a statement by the Secretary or the Director, OITT of which milestones were untrue? Which were listed as completed that were not completed or whose status was incorrectly reported? It might be helpful if the Ninth Quarterly Report included a section listing those described in this Introduction as not reflective of the true status of trust reform. Where was the Court misled?

And if the HLIP did not Aencourage reporting on the lack of success or the need for additional resources,@ this Court might want to consider requiring the Secretary to ensure the quarterly reports specifically address the lack of success all the future projects encounter and those that need additional resources or efforts. The reorganization and restructuring of the trust reform effort is so immense it can be expected that one or more projects will continue to have problems as the Secretary=s senior subordinates and whomever is appointed as the Assistant Secretary for Indian Trust Asset Management begin their work. A requirement that their difficulties and failures must be specifically reported may lessen the Ahuman inclination@ to forget about those pesky details when it comes time for a quarterly report.

The introduction also notes that milestones have been omitted because they did not fully disclose the status of trust reform. The past quarterly reports= milestones did not because of the way they were drafted B front loaded B so that progress could be shown early on and the hard part of the project kept for later Ato be determined@ or Aongoing@ milestone terminology. But one major problem with the Eighth Quarterly Report is that it has few timelines for the projects. How can this Court determine the progress of trust reform if there are no benchmarks on which to judge performance?[16] Granted, the Director, OITT has had a very few months and little help to determine what he has been able to about the status of trust reform presently and what has not been accomplished or reported in the past. But this Court should also require that the Defendants develop a means for keeping the Court and the Plaintiffs advised of future target dates, when those dates have to be adjusted and why. This Court cannot divine the status of trust reform except in the most general terms and, in this respect, the Eighth Quarterly Report is incomplete.

C. Secretary=s Observations

As Secretary Norton more accurately described the HLIP:

> A**The previous format focused on the steps we have taken and the completion of milestones. In retrospect, this format exacerbated the *ordinary human inclination to report accomplishments and to ignore obstacles, difficulties and problems that were not directly related to the milestones*. With this report, we have demanded that managers report both progress and problemsY.**

[16] As the Special Trustee has commented, A**In many cases the length of time to accomplish subprojects, however, can be estimated and should be. Otherwise the Special Trustee, the Secretary, and the Court have no useful time dimensions.**@ *See* Eighth Quarterly Report at 12.

The HLIP is now outdated. Many of its identified activities have been designated as being completed; however, *little material progress is evident*.@
Id. at 6-7, emphasis added.

The Secretary=s candor in the Eighth Quarterly Report is refreshing. But the exacerbation of the Aordinary human inclination@ to report only good news and ignore the bad was in the context of carrying out the highest fiduciary trust duties imaginable owed to the American Indians by the United States government. Compare this comment on the human fallibility of DOI and BIA officials with the realization that their reports were at the direction of and for the consideration of a United States District Court. A District Court that had previously held two Cabinet-level Secretaries and one Assistant Secretary in civil contempt for their and their subordinates= failure to overcome this ordinary human inclination to lie or dissemble when bad news as well as good was required by Court order to be reported by Defendants and their attorneys.[17]

The Secretary=s admission that activities had been designated completed when Alittle material progress is evident@ is the most telling comment in the entire Eighth Quarterly Report. The Secretary, in attempting to prepare an accurate and complete quarterly report, has now found what the Court Monitor has reported in every single Report to this Court B the reports have been untruthful. The only problem is that nowhere can be found any indication that those who have committed or permitted these actions constituting contempt on the Court have been or will be held accountable. No indication whatsoever that they will be forbidden to continue in supervisory or project manager roles in the proposed BITAM and their conduct reviewed for disciplinary action and possible dismissal from their present positions. Who within DOI will hold these officials accountable for the past and present harm caused to the IIM account holders by their unprofessional conduct and misleading reports that covered up and hid the most serious of their failures? Apparently no one, because they remain in leadership positions involved with trust operations and related management and legal activities or have moved on to equivalent senior positions within DOI.

Where also can be found the expressions of apology and remorse by these same executives, managers and attorneys that should now be substituted in the Eighth Quarterly Report for the repeated arrogant stances taken by the Defendants in the past seven false, inaccurate, and incomplete quarterly reports and their legal defenses of them before this Court?

These Indian Trust duties were no ordinary responsibilities or obligations of the United States; no APA administrative functions; not a Ano harm, no foul@ badminton game or walk in the park. The Secretary=s understanding of these human failings of her subordinates may fall on deaf hears in Indian Country where the effect of these unreported failures has been and is so severely felt.

Reference need only be made to the present IT Security failure and Court-ordered shutdown. The resultant loss of the income stream to the most needy IIM account holders

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[17] A**Boswell. I asked him whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty. Johnson. >Why no, Sir, if you act properly. You are not to deceive your clients with false representations of your opinion; *you are not to tell lies to a judge*.=@** James Boswell. *The Life of Samuel Johnson,* Penguin Classics, 1986, page 137, emphasis added.

and Indian Tribes is a perfect example of the result of these ordinary human inclinations. Who will be held accountable for the TAAMS= failures or the failure to even address the IT Security lapses? Failures made aware to the Defendants months if not years ago by their own paid consultants, the GAO, and the Special Master.

What also will be the human inclination of Senators and Representatives on oversight committees regarding the appropriation of more monies for the Defendants to try to correct this morass? And who will end up being harmed if the Congress might **B** understandably **B** be reluctant to trust the Defendants to perform any better in the future, further delaying trust reform until a new agency can be created and staffed? None other than those same IIM account holders who have suffered so much for so many years at the hands and tender mercies of the Defendants.

Candor about your subordinates= human failings is one thing, demonstrating how you will hold people accountable for their past and future nonfeasance, misfeasance or malfeasance is quite another. This Court and Congress should require no less.

2 Special Trustee Observations

What can be determined about the ability of the Defendants to correct the course of the trust reform effort in the future under whatever new organization they are proposing or are able to forge after Congressional hearings and American Indian tribal consultations? The Special Trustee, the longest serving political appointee and senior experienced trust official in the present administration, has his concerns:

> **AOverall progress on trust reform cannot be assured or confirmed, however, because of the apparent inadequate planning and execution to date of some subprojects and other important remedies for Indian trust.@** *Id.* at 14.

The IIM account holders may still not know the depth of the problems reported in the Eight Quarterly Report. Not because they necessarily cannot trust what was reported but because of what may not have been reported because it was not known or capable of determination:

> **AIt is important to success that the DOI senior management recognizes the interdependencies of the total trust reform effort. Reporting for the subprojects herewith may not include reporting on steps that should have been planned, the absence of which may present problems to the completion of the subproject. It is in that sense, at least, that parts of *this report remain inadequate,* in the Special Trustee=s judgment.@** *Id.* at 14, emphasis added.

The Special Trustee=s concerns address the major subprojects that form the core of trust reform **B** TAAMS, BIA Data Cleanup, and Historical Accounting. As for Historical Accounting, he stated:

> **AAs part of the accounting, the effort needed to provide an *historical* accounting is enormous and interconnects with other efforts directed at data cleanup. Project management issues for historical accounting will require careful coordination and demand considerable executive skill. In addition, *it is unclear to the Special Trustee whether or not the specific requirements of***

a full accounting to each beneficiary have been identified.@ *Id.* at 12, emphasis added in last sentence.

The Special Trustee has a polite way of saying that the Defendants have little hope of conducting a complete historical accounting with the state of the BIA Data Cleanup project as well as the lack of work during the last administration and the beginning of this administration on the Historical Accounting and Collection of Missing Information From Third Parties subprojects.[18]

TAAMS is now subject to abandonment:

AGenerally, EDS expressed serious reservations about the viability of the land use (leasing) portion of the TAAMS system, but felt the title portion could proceed in development and pout into use. The Department, however, has decided not to implement the title portion in additional locations pending further re-planning of the overall asset management systems projects. With that decision the Special Trustee concurs.@ *Id.* at 14.

The Special Trustee=s Observations highlight the glaring deficiencies in trust reform that he has been trying to report on since the Third Quarterly Report only to have his Observations peeled away one by one by DOI attorneys or BIA senior managers. Now, at the eleventh hour of his struggle, no one, not even the Solicitor, has questioned his telling it like it is. What he has summarized is the major uncompleted and, in some areas, missing efforts that have not been accomplished and must now be begun again.

3 Director OITT Observations

A basic question that has been asked and must be asked again is, based on the status now reported more accurately and completely in the Eighth Quarterly Report; can the Defendants manage the Aturnaround@ project that they face in light of the newly reported and recognized state of trust reform? Can the same managers and supervisors bring to the table what the Special Trustee has called Aconsiderable executive skill@ **B** skill in management of complicated systems, fiduciary trust operations, and an understanding of and commitment to the highest trust standards; not just Agood enough,@ but the best? The Director had some impressions:

A(S)ubproject managers were willing to state certain progress was made but when challenged could not always defend their position. In other instances, I would hear that subproject managers had completed a task, but when asked what happened with their work to insure that the beneficiary received his/her income, the answer often was: *That is not my area*. *Id.* at 15, emphasis in original**.**

AIt is apparent that some projects could be completed or >under control= yet not add substantively to the requirements of a person receiving income from assets held in trust for them. Although some confusion arises from different writing styles in their reports, the reporting often lacks complete thoughts and understanding of the problems affected or created by the work being reported.@ *Id*. at 16.

[18] A more thorough discussion of the status of OHTA and its pending Comprehensive Plan on historical accounting is contained in the Fifth Report of the Court Monitor.

The Secretary has proposed a new trust management structure within DOI. The Director, OITT is engaged in preparing to transition offices and people to that organization. But where will the supervisors and managers come from? Is he doomed to rearrange the chairs on the deck of the Titanic as the Plaintiffs and the Indian Tribes fear?

4 Issues Raised By the Eighth Quarterly Report

What issues have been raised that impact on this Court by the information contained in the Eighth Quarterly Report? What is the status of IIM trust reform and how does that status relate to the Court=s December 21, 1999 order?

The present contempt trial addressing the five areas this Court has delineated for review will deal with issues of truthfulness in the quarterly reports and the specific reporting failures on TAAMS, Historical Accounting, BIA Data Cleanup, and IT Security. For the most part, the Eighth Quarterly Report is a transition document. It has unavoidably cast severe doubt on past quarterly reports and those trust reform activities of the Defendants **B** proper subjects for review in the contempt trial. It also addresses the future course of trust reform that was also a requirement of the December 21, 1999 order of this Court.

In so many words, the Defendants are attempting to show this Court that they have put the past behind them and are beginning yet again. They have identified what they believe to be all of the trust reform standards mandated by statute and court decisions as outlined in the 1994 Reform Act and as further defined by this Court and the Circuit Court. They have developed a new process for ensuring accurate and complete reporting. They have begun a new Historical Accounting project with a new organization **B** OHTA **B** to carry out the preparation of a Congressionally required Comprehensive Plan for determining the method for historical accounting. They have begun to reorganize the entire trust reform and trust operations of DOI and hope to place them in a new organization **B** BITAM.

In light of this Court=s admonition at the time of its December 21, 1999 decision that they had one more opportunity to bring about trust reform before the Court would again look at the Plaintiffs= request for more supervision by the Court, they are attempting to demonstrate to this Court that, whatever their past failures to live up to the Court=s admonition, whatever their nonfeasance, misfeasance, or malfeasance, they deserve another opportunity. If by law they cannot prevent this Court from greater supervision of DOI=s future trust reform efforts, at least give them one more chance based on their progress and good faith before the Court again steps in.

All parties with an interest in the decision of this Court are weighing in with their opinions. They include a sincere concern on the part of Indian Tribes that any removal of trust operations and reform efforts from the BIA will severely damage the government-to-government relationship and the self-determination goals of present statute and regulation presently carried out by the BIA in concert with the Indian Tribes.

Still others, like the Special Trustee=s Advisory Committee, seek to have a separate government organization created to take over the fiduciary trust responsibilities to the IIM account holders. This proposal is not unlike that originally proposed by the first Special Trustee in his Strategic Plan that was rejected out-of-hand by the former Secretary.

Only Congress can authorize the creation of a new government agency and appropriate funds for its operation and staffing. Federal courts are limited to deciding what action to take regarding those federal agencies and issues properly before them under applicable jurisdictional statutes. The Circuit Court has cautioned this Court about its supervisory authority:

AThe level of oversight proposed by the district court may well be in excess of that countenanced in the typical delay case, but so too is the magnitude of government malfeasance and potential prejudice to the plaintiffs= class. Given the history of destruction of documents and loss of information necessary to conduct an historical accounting, the failure of the government to act could place anything approaching an adequate accounting beyond plaintiffs= reach. This fact, combined with the longstanding inability or unwillingness of government officials to discharge their fiduciary obligations, excuse court oversight that might be excessive in an ordinary case.

The government is correct that the court imposed continual reporting requirements that may be in excess of that which would be minimally required to discharge the government=s duties. However, it does not seem that the district court=s remedies are disproportionate to the nature of the government=s breach. Moreover, while the court should (and did) remand to the agency for the proper discharge of its obligations, the court should not abdicate its responsibility to ensure that its instructions are followed. This would seem particularly appropriate where, as here, there is a record of agency recalcitrance and resistance to the fulfillment of its legal duties.

Y.

Nonetheless, we expect the district court to be mindful of the limits of its jurisdiction. **It remains to be seen whether in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting, and the detection of such steps would fit within the court=s jurisdiction to monitor the Department=s remedying of the delay; beyond that, supervision of the Department=s conduct in preparing an accounting may well be beyond the district court=s jurisdiction.** *Cobell v. Norton*, 240 F. 3d 1081 (D.C. Cir. 2001) at 1110, emphasis added.

This Court must answer the question of what action will it need to take in addition to that provided for in its December 21, 1999 order? This decision will ultimately and appropriately be based on its findings after the contempt trial. Has the magnitude of the further government malfeasance (if so found) so prejudiced the plaintiffs and violated this Court=s order that only more oversight by this Court will protect their interests and keep the Defendants honest? That determination will be partially the result of a comparison of the level of the Defendants= duty to the IIM account holders and the injury the Indian beneficiaries may continue to face if that duty continues to be ignored. The additional guidance of the Circuit Court is helpful here also:

With regard to the Defendants= duty:

AThe Secretary has an ›overriding duty Y to deal fairly with Indians.= This duty necessarily constrains the Secretary=s discretion. When faced with several policy choices, an administrator is generally allowed to select any reasonable option. Yet this is not the case when acting as a fiduciary for Indian beneficiaries as ›stricter standards apply to federal agencies when administering Indian programs= Summarizing federal case law on fiduciary obligations owed to Indian tribes, the Tenth Circuit concluded that where ›the Secretary is obligated to act as a fiduciary Y his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary.= *The federal government has ›charged itself with moral obligations of the highest responsibility and trust= in its relationships with Indians, and its conduct ›should therefore be judged by the most exacting fiduciary standards.*=@ *Id.* at 1099, citations omitted, emphasis added.

With regard to the potential injury and plaintiffs= interests in avoiding that injury the Circuit Court stated:

AThe district court noted that the consequences of further agency delay are potentially quite severe. Documents necessary for a proper accounting and reconciliation have been lost or destroyed, and the district court found little reason to believe that this would change in the near future. ›The longer defendants delay in creating the plans necessary to render an accounting, the greater the chance that plaintiffs will never receive an actual accounting of their own trust money.= Given that many plaintiffs rely upon their IIM trust accounts for their financial well-being, the injury from delay could cause irreparable harm to plaintiffs= interests as IIM trust beneficiaries. *Thus it seems that ›the interests at stake are not merely economic interests in (an administrative scheme), but personal interests in life and health.*= *Id.* at 1097, footnotes omitted, emphasis added.

The plaintiffs have stated it even more succinctly in their Open Letter to Indian Country:

A<u>Doing nothing is not an option.</u> It is clear to all by now that the IIM system is in crisis. Recent reports and findings by two investigators appointed by the Judge B Court Monitor Joseph Kieffer and Special Master Alan Balaran B state with unmistakable clarity that the most fundamental elements of a properly functioning trust management system are absent in the IIM trust.@ *See* **Tab 10** at 1.

If this Court agrees with the plaintiffs and finds the need for a remedy based on the contempt trial, it is respectfully submitted that the status quo is *not* an option. The Deputy Secretary of the Interior, J. Steven Griles, expressed that same sentiment in the presence of the Court Monitor during his presentation to the Special Trustee=s Advisory Board on December 7, 2001.

That same Advisory Board has also proposed the establishment of a new government agency to handle trust reform and, in doing so, stated:

AAfter considerable deliberation, we believe that successful execution of the government=s responsibility as trustee for Indian beneficiaries will require dramatic realignment of that responsibility.@ *See* **Tab 9** at 4.

The question becomes one of who should direct the necessary Arealignment?@ Should the Defendants, should Congress, or should and can this Court craft a solution within the judicial powers conferred on Federal Courts by the Constitution that will solve this crisis? This particular question is not the subject of this analysis and is better left for another day and another forum.

What is the proper subject of this analysis is what considerations should factor into the decision of whether the Defendants **B** the Secretary and Assistant Secretary for Indian Affairs **B** have any expectation of succeeding with their current plans for the historical accounting and reorganization to address Afixing the system@ that was the subject of this Court=s order. The question of the sufficiency of the OHTA=s historical accounting Comprehensive Plan and the actions taken to begin that accounting are the subjects of the Fifth Report of the Court Monitor and will not be addressed here. Fixing the system will be the job of BITAM and the proper subject of this Court=s review to find a remedy, if necessary, for fixing not only the trust reform Asystem@ but also changing the conduct of the Defendants that is presently the subject of the contempt trial.

F. BITAM

There are a number of considerations necessary to place in proper perspective the proposed reorganization discussed in the Eighth Quarterly Report and other recent filings such as the ANotice of Proposed Department Of The Interior Reorganization To Improve Indian Trust Assets Management@ (**Tab 14**). That Notice addressed some of the areas for consideration by this Court of the Defendants= reorganization proposal:

> A**The proposed reorganization consolidates Indian trust asset management functions in a new agency: the Bureau of Indian Trust Asset Management. The proposed Bureau will report to an Assistant Secretary for Indian Trust Assets Management. The Special Trustee for American Indians will continue to perform oversight for the Department=s trust reform efforts. The Bureau of Indian Affairs, under the supervision of the Assistant Secretary B Indian Affairs, will continue to provide those services to Indian tribes and individuals that are not related to trust assets.**
>
> **The proposed reorganization impacts many interested parties. Interior has begun consultation with Indian tribes and with Congress. Appropriate notification to departmental employees and union representatives will occur on November 15, 2001. Also, candidates for the Assistant Secretary and the Bureau Director must be found. The Assistant Secretary must be nominated and confirmed.**
>
> **Trust reform activities will continue during this transition process. The final organization structure will depend upon the results of the consultation process. Implementation will progress as soon as it becomes final. In the meantime, three key subprojects (TAAMS, BIA Data Cleanup, and Probate) will be supervised by Ms. Donna Erwin, previously Deputy Special Trustee for Trust Systems and Projects, under a newly-created Office of Trust Transition in the Office of the Secretary. Planning for the transfer of the remaining subprojects is underway.@** *Id.* at 2.

The first consideration for this Court centers on the fact that this reorganization is a proposal, a plan, in its beginning stages. Attached to the Notice is a one-page organizational chart that will need extensive modifications and additions.

Not only is it solely a chart for an organization, the concept must receive the review and advice of the Indian Tribes that it will affect as their trust assets will also be managed by BITAM. The Afinal organization structure will depend upon the results of the consultation process.@ *Id.* So there is no present organization, strategic plan, or business model.

Second. The senior officials to lead BITAM must be selected and, in the case of the Assistant Secretary to head it, confirmed by the Senate. Who will be these officials and what will be their background and experience in trusts, systems, or management of large government or commercial agencies involved in the provision of fiduciary trust services to hundreds of thousands of beneficiaries with assets and resources as varied as any beneficiaries in any commercial trust in the United States?[19]

Third. According to the Notice, the Special Trustee will continue to perform oversight for the BITAM and the DOI=s trust reform efforts. But will he be given the resources and personnel to permit him to appropriately oversee their operations and the authority to assure the Secretary and the Congress that trust reform is finally on the road to recovery and, later, that trust operations are functioning properly? Or will he be dependant on the Acooperation@ of the BITAM and subject to the counsel of the DOI Solicitor=s Office? Will the Secretary=s counselors rely on his observations or follow his advice to any greater extent than they did in the verification of the Seventh Quarterly Report? Will he be given his own counsel to explain to him such legal terms as Averification?@ What assurance can this Court and the Special Trustee be given that his candid opinions of problems with trust reform or trust officials will not result in his dismissal or the reorganization of his office without his knowledge or agreement as was the fate of his predecessor resulting in his resignation?[20]

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[19] Another issue that will always be present in the federal government is, no matter how far the staffing of the BITAM organization gets before the Presidential election in 2004, the results of that election could just as quickly remove the political leadership in charge of it. What then might the next administration do?

[20] The Special Trustee=s observations on the proposed reorganization are not addressed within the Eighth Quarterly Report. It might be of interest to this Court and the Congress to determine what his opinion is about the reorganization=s potential to meet the strict Indian Trust fiduciary obligations of the Defendants, what role he has established with the Secretary for the Office of Special Trustee regarding BITAM, and what is the position of the Defendants on supporting that future role with resources, staff and counsel. Without a strong oversight function by the Office of Special Trustee, only this Court will be able to confirm the Defendant=s reports of trust reform progress through further oversight and discovery. Congress will have no ability to obtain the information the 1994 Reform Act sought by establishing a Presidential appointee as their source of oversight and control over Defendant=s activities and compliance with Congress= trust reform provisions in that Act.

Fourth. How will the BITAM be staffed? Where will Defendants find the experienced senior managers, trust officials, systems managers and employees with the requisite skills to understand and carry out the fiduciary trust responsibilities to the IIM account beneficiaries? Will most come from the BIA? Certainly there are qualified BIA officials that have performed very well with their trust reform duties when given the appropriate resources and supervision. But the Eighth Quarterly Report is replete with examples of the lack of experienced BIA managers and DOI senior level officials who have brought trust reform during their watch to the sorry state it is in today. They also have failed to report accurately and completely to their past supervisors, the Special Trustee, and the present transition team. Whether their omissions were intentional or due to ignorance does not matter; they should have no further role to play in trust reform or trust operations.

Finally, while not specifically addressed in the Notice, the elephant in the living room of BITAM is why would anyone believe that this solution to trust reform will have anymore success than the HLIP plan when the executive level officials in DOI who have been responsible for this debacle are still in positions of leadership prepared to continue to Aoversee@ but not be accountable for trust reform operations. Will the SES-level officials purchase another ALMYR or TAAMS and provide little or no guidance and oversight on its development? Will the Office of PMB strike out the needed monies for BITAM and the Special Trustee from the budget submissions to the OMB and Congress in favor of other DOI bureaus and projects? Will the commitment be there for the IIM account holders this time? Not if they continue to have any role in trust reform.[21]

There are positive factors for consideration regarding the creation of BITAM. Assuming Defendants can successfully address the issues discussed above, creating and staffing a new bureau within DOI with competent trust officials and managers would allow the federal

[21] It is not the Court Monitor=s role to address the legal and Constitutional issues regarding the appointment of a receiver over a cabinet-level department. However, a receiver, if appointed by this Court to oversee IIM trust reform, would face many of the same obstacles just addressed; maybe more. While he or she would have the power inferred from the Court=s appointment order, the same staffing, resource, and management issues would have to be faced. The receiver=s role would not be simply to manage what presently exists. The question of whether the receiver would choose to rely on BIA or other DOI officials does not become any simpler for the receiver than for the Assistant Secretary for BITAM just because this Court appointed the receiver. It is a complicated matter of competency; dedication to and understanding of the fiduciary trust duty; and accountability. Those qualities will not automatically be created in BIA or DOI upon the appointment of a receiver. The receiver might well come to the same conclusion as the Defendants that the most efficient management and organizational structure for trust functions would be to remove them from BIA as well as the other bureaus and centralize them in a separate organization. There is also the issue of trust reform delay while the almost certain appeal challenging such an appointment makes its way through the appellate process to the United States Supreme Court.

budgetary and executive branch management network and relationships to remain unbroken. Congress would continue to deal with an executive branch bureau. DOI would not have the appendage of a receiver-led organization to avoid and oppose. The branches of the federal government would continue to interface with a similarly structured organization capable of customary interaction with them.

The decision boils down to a consideration of whether the Defendants should be given, and are capable of succeeding with, another opportunity? Has their conduct in the last two years been sufficiently horrendous, as the plaintiffs would characterize it and as the Court Monitor and the Special Master have documented it, at least in some cases, for the Court to have no trust in their protestations of commitment to trust reform in order to carry out its warning in its December 21, 1999 decision, to wit:

ADespite defendant=s history, the court has decided to give defendants one last opportunity to carry through on their promisesY. Should the court find in the future upon proper motion by plaintiffs that defendants have been less than truthful in their representations or that defendants= adherence to prompt remedial action turns out to have been feigned, then the court may well decide to exercise its authority to ensure that its orders are carried out.

For the time being, the court will give the government perhaps for the last time in this case, the benefit of the doubt.

Y.

The court emphasizes, however, that it would not be an abuse of discretion to appoint a Special Master or Monitor to closely check defendants= progress toward bringing themselves into compliance with their trust duties.

Y.

That failure to abide by court decree, which the court has characterized as the most egregious governmental misconduct that it has ever seen, has already led to the appointment of a Special Master to monitor compliance with defendants= discovery duties. Defendants are but one step away from earning more involved court oversight over the IIM trust, such as another Special Master or Monitor, should they fail to live up to their own representations or fail to abide by the court=s order issues this date.@ *Cobell v. Babbitt*, 91 F. Supp 2d 1 (D.D.C. 1999), at 54-55.

This Court, as part of its decision following the contempt trial, will determine whether Defendants have failed to meet the standard of conduct expressed by the Court in order to be granted a continuance on that Aone last opportunity@ and receive the benefit of the doubt in order to continue with their trust reform reorganization. The remedies, if they have not met the standard this Court set, are available. The parties have offered two.

The Defendants have taken a proactive step, based, they say, on the EDS reports and those of the Special Master and Court Monitor, to clean up their own trust reform Ahouse;@ in the expectation of a later visit from the Court to discuss their performance. The plaintiffs offer the option to the Court **B** send in a receiver to build a new house since, in their opinion, the last one was never built. They fervently believe the Defendants have acted so badly and damaged the resident IIM account holders to such an extent as to warrant someone else

under the Court=s direction managing the IIM account holders trust services and accomplishing the historical accounting **B** building that house.

There are other options between these two extremes that might be warranted based on the Court=s statements and the present state of trust reform Areform.@ The Secretary may be heard to argue that, even though civil contempt against Defendants can be based on the acts of her predecessor and his subordinates, most of those acts occurred on his watch. Even though the present administration has serious problems to address as a result of its subordinates conduct, she may also argue that, once her senior staff was appointed, including the Deputy Secretary and the Associate Deputy Secretary, and the Deputy Secretary further appointed the Director, OITT and the Deputy Special Trustee to oversee trust reform and trust reform reorganization, she put the DOI on a course to achieving an historic restructuring of the Indian Trust and its reform effort. She also has stated she believes she has the commitment of the President of the United States to sufficiently fund this reorganization.

There is recent evidence of this proactive trust reform effort however long in coming. It has been addressed in previous reports of the Court Monitor and is summarized in the Eighth Quarterly Report. It has been evident that the Deputy Secretary and his immediate staff, including the Associate Deputy Secretary, have been personally involved in addressing the recommendations of the EDS reports and the DOI management and communications problems first identified by the Special Trustee. They have visibly marshaled the resources and personnel of DOI to begin to create a new Indian trust organization **B** BITAM **B** out of whole cloth. They have accomplished these tasks and arrived at where they are today in a very short time.

These accomplishments, along with the creation of OHTA and the decision to bring in EDS for a comprehensive review of trust reform operations, were at the direction of this Secretary. She should be given credit for the valid accomplishments, based on her direction and support, of the Deputy Secretary, J. Steven Griles, and the Associate Deputy Secretary, James Cason. They have engineered what the Director, OITT and the Deputy Special Trustee have accomplished with the 8th Quarterly Report preparation and review process. That this effort may be a day late and a dollar short is only partly the fault of this administration. But this administration has at least started to do something proactive and original.[22]

The Secretary stated in her Observations:

> **AI can assure the Court that trust reform has the attention of the Department=s senior political management team. The first member of my management team was sworn in on July 4, 2001, and *since that time*, we have spent more time on trust reform than any other single issue. Seemingly every day my senior management team and I learn more about the challenges of reforming the past trust management policies, practices and systems. We believe we now have a better understanding of the objectives the Department must accomplished.@** *See* Tab 5 at 6, emphasis added.

[22] Plaintiffs would argue that it was this Court=s expressed concern in open court about the Secretary=s possible civil contempt that prompted the reorganization. **ADepend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.@** *Id.,* Boswell at 231**.**

The implication is that she could do nothing before this one official was on board. This does not totally explain the delay in beginning this effort. She had begun to receive briefings on trust reform much earlier. In her first appearance before the Congress on February 28, 2001, she stated to the Senate Committee on Indian Affairs:

AI have moved forward with a directive for statistical sampling so we can move forward without being slowed by the litigation.@ *See* First Report of the Court Monitor at 40.

She also addressed the Circuit Court=s decision in a press release on the same day:

AWe take seriously the message from that decision.@ *Id.*

Someone was there to help her make these decisions and for her to rely on for advice and action concerning trust reform. She also had assigned her Counselor to meet on a weekly basis with the Court Monitor who kept the Counselor informed of any issues that were of concern including both the historical accounting and TAAMS. The Court Monitor=s expression of concern with the Secretary=s historical accounting statistical sampling decision was communicated to the Counselor on May 4, 2001. He received the same TAAMS briefing from the GAO as the Court Monitor and the Special Trustee heard on June 11, 2001 in which it was reported that the GAO representatives, who had observed the Integrated User Acceptance Test of TAAMS in May 2001, were not certain TAAMS was salvageable and that DOI should consider delaying its further implementation until an assessment could be made of the options available to correct the management and systems failures. *See* Second Report at 8.

She issued her first orders on reorganization of the historical accounting project on July 10, 2001 and also authorized the hiring of EDS by the Special Trustee to begin the process that has culminated in the reorganization planning. But all was not well after the arrival of her senior managers. She or her Solicitor still did not listen to the Special Trustee=s warning that he would not verify the Seventh Quarterly Report. She went so far as to have her Solicitor question him about his Observations instead of doing what she has done in response to the order of this Court **B** go behind the written reports of her subproject managers to attempt to find the truth and the actual status of trust reform. It can be assumed she now understands the nature of the Special Trustee=s concerns about the Seventh Quarterly Report. It was not the lack of advisors that has brought the Defendants to where they are today before this Court. But it certainly was the lack of good advice.[23]

The Secretary=s plan for the reorganization has received the vehement and public opposition of the Indian Tribes and the Plaintiffs. But the ongoing consultation process and the hearings Congress is about to hold on Defendants= plans for historical accounting and BITAM, among other Indian Trust issues, will further address just how real and viable the Deputy Secretary=s efforts are and whether there is the potential for the planned reorganization.[24]

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[23] One need only refer to the previous statement made by the Secretary before Congress on the statistical sampling decision. If she had no advisors she could rely on, why make such a crucial decision and statement before the Senate in light of this Court=s and the just-reported Circuit Court=s decisions?

[24] The stated objections to the Secretary=s proposed reorganization of the Indian Trust reform efforts do not have any common theme other than mistrust in the DOI and its ability to carry out trust reform and protect

Indian Trust beneficiaries= assets. But if the Court Monitor=s Reports have uncovered anything it is that the status quo cannot continue and either the Defendants, this Court, or Congress will have to place trust reform under one cohesive organization that is structured to effectively supervise and hold accountable those officials with the duty to provide the fiduciary obligations and services owed by the United Stated to the Indian Trust beneficiaries, both individuals and tribes. Whether that organization is established under the Secretary of the Interior or a new government agency, a central precept of the three branches of government now considering the issue should be that the same DOI and BIA officials who have so badly mismanaged and failed to effectively carry out trust reform and trust operations should not lead or staff the new organization.

Their efforts, notwithstanding the public criticism, have not gone in vain. In the opinion of the Court Monitor, the Eighth Quarterly Report reveals a review process that was more stringent and thorough than any heretofore for a quarterly report. The Director, OITT and the Deputy Special Trustee, as well as an apparently uninhibited Special Trustee, have been openly critical and pointed in their observations and critique of subproject managers= reports. While still not complete, the Eighth Quarterly Report provides this Court with a clearer and more comprehensive picture of the state of trust reform than it has had in the seven previous quarterly reports filed over the last two years. The Eighth Quarterly Report, partially due to this candidness, has shown a trust reform effort in disarray, in need of total reorganization and the scrapping of the HLIP and, potentially, TAAMS.

However, while the Deputy Secretary has spearheaded the initial planning for BITAM and the Director, OITT has been appointed for the transition, the effort so far has centered on the Eighth Quarterly Report. There is no BITAM except in concept and words. There is no team of experienced trust officials and no staff. The Director and the Deputy Special Trustee must rely on the past management to run trust operations while they, at the same time, try to build and staff a new organization with experienced trust officials and managers.

One incomplete quarterly report does not trust reform make. The second shoe of remedying, if possible, the Defendants= past trust reform failures has not dropped. Plans, proposals, consultations, hearings, reviews, and criticism of past trust reform activities are not trust reform. If the Eighth Quarterly Report is not totally accurate in any of its section=s assessments of individual subproject status and progress it is in an overall sense. It has characterized trust reform as requiring total reevaluation, restructuring and strategic planning to even begin to address what the Secretary has described as the Agrowing appreciation of the problems involved and the intensive effort necessary to address them.@ *See* **Tab 5** at 6.

There is still no one in charge of trust reform operations who can bring strict fiduciary trust management and accountability to what heretofore has been and is, with regard to at least the major subprojects such as TAAMS and BIA Data Cleanup, a completely disorganized and leaderless exercise in futility. To win over Defendants= critics, the present effort described in the Eighth Quarterly Report must continue to show the Secretary=s and her key political management=s involvement in and responsibility for making major and rapid improvements in all aspects of trust reform within the DOI. The results of the tribal consultations, Congressional hearings, and further internal trust reform and reorganization decisions could well signal whether the Secretary=s commitment and the proposed reorganization is a flash in the pan or a concerted effort to correct the mistakes and failures of the past. They will also aid this Court in making a potentially complicated decision following the completion of the ongoing contempt trial regarding what remedy is necessary and appropriate for the past two years= of Defendants= alleged noncompliance with the Court=s December 21, 1999 order and concomitant fraud on the Court.

IV. CONCLUSIONS AND DISCUSSION

1 The Eighth Quarterly Report=s Preparation And Review Have Provided This Court With A Markedly More Complete And Accurate Assessment Of The Status And Progress Of Trust Reform Than Found In The Past Seven Quarterly Reports B But Serious Shortcomings Remain

The Special Trustee does not believe the Eighth Quarterly Report is complete or that the Defendants can even determine where it is not. The Court Monitor agrees. The Report is an amalgam of conflicting statements and counter-statements. It contains no organized plan of action or even a baseline or timelines for this Court to determine the extent of the effort necessary to bring trust reform to reality. The Eighth Quarterly Report leaves it to this Court to decide how bad things really are. In that regard alone, the Report is complete and accurate **B** things are really bad. But, by finally holding the subproject managers and their supervisors accountable for verifying their reports, the Deputy Secretary and his appointed staff have succeeded in bringing a measure of credibility to the Eighth Quarterly Report. They have also gone behind the reports of their subproject managers to try to fathom where trust reform actually stands. They have, arguably to the best they can, stated their own opinions regarding where trust reform stands **B** even if those opinions disagreed with their own subordinates= positions.

They have also shown an understanding of what must be done to correct the mistakes and failures of the past. The enormity of that effort as portrayed by them gives additional veracity to the Eighth Quarterly Report. While it can be argued that there was little unknown about the state of affairs with such projects as TAAMS and BIA Data Cleanup, the Director, OITT and the Deputy Special Trustee have gone even further in their plans for attacking the failures than the recommendation of their consultant, EDS. A specific example of this type of decision is in not accepting the recommendation that the TAAMS current title module be deployed to other Regions. It will be reviewed along with the realty module before any further deployment of this likely unsalvageable system is conducted. That decision was supported by the Special Trustee and was necessary in the opinion of the Court Monitor. But it was not an easy one to state in light of the past subproject managers= protestations that ATAAMS works.@

2 The Eighth Quarterly Report Confirms That The TAAMS And BIA Data Cleanup Subprojects, Among Others, Will Require Total Reorganization; That TAAMS Is Most Likely Unsalvageable; And That DOI and BIA Trust Reform Management Will Require Reorganization And Consolidation Under One Organization In Order To Provide The IIM Account Holders With Meaningful Trust Reform

The Eighth Quarterly Report can be viewed as more accurate and complete than any other quarterly report for the single admission that the two major subprojects under the now Aobsolete@ HLIP are in need of total management reorganization, strategic planning, and systems and consultant reviews and retargeting. Most of the other HLIP subprojects or new activities required for trust reform will require major restructuring and replanning. What is not provided is any idea of when the IIM account holders can expect to have a system that works and an historical accounting that will ensure that Indian Trust system can provide them the Congressionally and Court mandated fiduciary trust accountings to which

they are entitled as beneficiaries of the Indian Trust.

The Report confirms the basis for the Secretary=s decision in adopting the EDS recommendations to reorganize the organization and staffing of DOI trust reform under one assistant secretary and in one organization instead of the fractionalized structure and leadership presently spread between BIA, OST, and other bureaus. However controversial the reorganization, due in part to the Indian Tribes= concern for the manner in which the planning began without consultation with them and the impact on their government-to-government relations of taking the trust function away from BIA, the status quo cannot be maintained. The reorganization must be carried out **B** by someone.

It is the opinion of the Court Monitor a separate organization under one senior political appointee is the Defendants only hope of coming into compliance with the 1994 Reform Act and this Court=s order. Whether that organization should continue to be structured and run under the yet to be appointed Assistant Secretary or a receiver appointed by this Court will be a decision to be addressed by this Court, if warranted, after the contempt trial. That organization should be permanent and not returned to the BIA or other agency within DOI.

Apparently, a Tribal Task Force will work side-by-side with the Deputy Secretary, the Assistant Secretary **B** Indian Affairs, and the Director, OITT, and will address, as will Congress, how to best protect Tribal interests during and after the reorganization. The reorganization may take on another direction following those consultations and hearings.

The jurisdiction of this Court is limited to consideration of IIM account holders= claims presently before it. However, the Tribal consultations and Congressional hearings could well change the direction of Defendants= trust reform efforts already placed before this Court for its consideration in addressing those claims and the Defendants= alleged contempt. It is recommended that the Court determine the results of these consultations and Congressional hearings to be able to better address the future course of Defendant=s trust reform efforts before its consideration of the proper remedy for any possible finding against the Defendants following the contempt trial.

3 The Eighth Quarterly Report Has Confirmed The Major Inaccuracy And Incompleteness Of The Past Quarterly Reports

Repeating the statements of the Secretary, Director, OITT, Special Trustee, or Deputy Special Trustee regarding the accuracy and completeness of the reports they received and reviewed for the Eighth Quarterly Report=s preparation is unnecessary for this conclusion. The Defendants cannot have it both ways. If they now believe that total and complete reorganization of trust reform is necessary and the reason is that trust reform is in such bad shape that no less of a solution is possible, the past quarterly reports could not have been accurate and complete; because they never reported such a decision or view. Except for the Special Trustee Observations, heavily edited by the Defendants, the quarterly reports provided this Court with a picture composed of reports that the HLIP subprojects were making progress and completing milestones.

It is not necessary to waste this Court=s time in citing chapter and verse on why those reports were inaccurate and incomplete. One question that is now before this Court in the

contempt trial is did they constitute a fraud upon this Court **B** an intention to deceive it by the paucity of accurate and complete information wrapped in rosy projections of completion of projects such as TAAMS in the next quarter and the deployment of a TAAMS current title system of record in four Regions. Were these statements based on ignorance or were they (in the words of the Secretary) just the ordinary human inclination to (in the words of the Court Monitor) make false representations to this Court because they were afraid reporting the truth would land them where they are today? That decision may well influence what will be necessary for the Court to do to ensure the Defendants= future trust reform efforts do not fail.

1 REMARKS

There is little left to say. Secretary Norton has candidly told this Court in the Eighth Quarterly Report what the Interior Defendants could avoid admitting no longer. Trust reform is a chimera. The trust reform ship has been scuttled far outside Secretary Babbitt=s metaphorical safe harbor. A cynical observer would go so far as to say it never left dry-dock; rotting there.

But the now-acknowledged status of trust reform is only the beginning of the solution to unraveling the immense problems and failures of trust management and systems. Secretary Norton has proposed and begun to institute one possible solution **B** create a new organization that would be led by an Assistant Secretary in charge of a new bureau **B** BITAM **B** and would centralize all Indian Trust functions within this entity. Plaintiffs have requested that this Court appoint a receiver to handle only the IIM account holders= trust assets. Congress will soon have before it proposals, among others, for a separate government agency in which to place all United States= Indian Trust obligations.

The questions that need to be answered by Secretary Norton and all who consider the proper organization and staffing of the Indian Trust to resolve this crisis are many. They go far beyond who should manage the new effort; an effort that must be begun anew to bring about long-overdue Congressionally mandated and Court-ordered trust reform as quickly as possible. They begin with the realization that the status quo is no longer an option.

The first question that must be addressed is how can an organization be staffed with experienced trust executives and managers, systems experts and employees, in a well managed structure where experienced, responsible and accountable trust officers will not repeat the mistakes and failures of the past? That question, it is respectfully submitted, must be addressed by this Court following the contempt trial if a remedy must be found for the Defendants= conduct based on one or more of the causes of action now under consideration in that trial.

The management of future trust reform activities by the Secretary, or by a Court-appointed receiver, will require more than just Abusiness as usual.@ The Secretary has recognized this obvious if unpopular truth. Whether inspired by this Court=s concerns or her own investigation, or both, she has ordered a historical reorganization of trust reform. Her plan, however, has been opposed. It has been opposed partly because it seeks to withdraw trust operations from the BIA as well as other bureaus and the Office of Special Trustee. Also,

it would keep the responsibility to conduct Indian Trust fiduciary duties within DOI. The stated reasons for this opposition deal with trust **B** or a lack of trust **B** regarding whether the Defendants**:** employees can in the future effectively manage trust operations and reform, would report honestly to the Indian Trust beneficiaries and this Court, and whether the plan would not destabilize if not destroy the BIA and the government-to-government relationship it represents.

But this is the paradox and the difficulty in answering the initial question of who assumes responsibility for trust operations and reform. The very senior officials and management of the BIA, who the Indian Tribes want to see retain trust authority, are the same officials who have so consistently shown their inability, unwillingness, and lack of understanding of their trust fiduciary duties in conducting their trust operations and reform efforts as reported in the past Reports of the Court Monitor.

The answer to the question, whether eventually made by this Court, the Congress, or the Secretary of the Interior, will likely spell the success or failure of what all must now realize is the need to *begin again*. There is an overwhelming historical mandate and contemporary humanitarian, moral, and fiduciary trust obligation of the highest magnitude on the United States to develop an Indian Trust that can properly account for and manage the Tribal and individual Indian beneficiaries**:** holdings.

The three branches of the federal government are now joined for what is one brief moment in this historical saga; joined in parallel efforts to consider the creation of an organization with the expertise and long-term commitment to solve the past DOI and BIA management and systems failures and replace them with the highest quality Indian Trust operation. It is a decision that cannot be avoided or delayed any longer. It is over one hundred years in coming. One of the three branches of the federal government must manage the creation of a new fiduciary *trust* organization whose experienced *trust* officials must select, organize and train a nationwide *trust* staff and move forward as rapidly as possible at building a new *trust* management system **B** not tinkering with a resurrected crew and vessel **B** to properly house, maintain, and protect the Indian Trust beneficiaries**:** land, resources, and assets.

Copies of the Sixth Report of the Court Monitor have been provided to:

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